

# The Interaction of Contract Law and Tort and Property Law in Europe

*A Comparative Study*

Christian von Bar  
Ulrich Drobnig

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A Comparative Study

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## Preface

This book is the collective work of jurists from fifteen European jurisdictions. It was completed under our coordination in nine months of intensive cooperative labour. Its purpose is to promote informed opinion and advance the process of policy formation with regard to the substantive scope of the Common Frame of Reference desired by the European Commission and the European Parliament. This Common Frame of Reference will in turn have the potential to play a large and perhaps prominent role in efforts towards addressing the problems created by divergence of the aspects of private law relevant to the internal market. Before any such measures can be contemplated, a discussion must in our view be initiated as to whether such an unprecedented instrument should be confined to contract law or extended to the neighbouring areas of the law of obligations and property law. In order to probe the border areas between contract and tort law and between contract and property law and their impact on the internal market, the European Commission commissioned this Study. We present the results of that work in this book publication for the wider benefit of experts and interested parties. We do so in the light of experience that scholarly legal analyses which are only published in the internet usually obtain a limited readership. Our Study appears under the imprint of Sellier. European Law Publishers, who will also be publishing the results of the work of the Study Group on a European Civil Code.

We are grateful for the permission of the European Commission, for whom this Study was undertaken, allowing us to publish the Study in book form. In accordance with the Commission's request, we explicitly acknowledge the Commission's rights (copyrights and others) in the Study. It was submitted to the Health and Consumer Protection Directorate General (SANCO B5-1000/02/000574) as a draft final report on 23 February 2004 in return for an overall contract sum of € 225,000. The opinions expressed in this Study are those of its authors and do not represent the Commission's position. This publication is freely accessible on the Commission's webpage under [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm)

Osnabrück and Hamburg, May 2004

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## I. The Background

1. **The subject of this study** On the basis of this study the European Commission is seeking to determine “whether competition imbalances, or real or likely obstacles to the smooth running of the internal market might arise as a result of areas of interference, problems in enumeration of facts, or even differences in terminology or concepts (mainly in mandatory provisions) between property law and contract law, and between non-contractual liability law and contract law. The aim is not, therefore, to examine property law or liability law as a whole, nor to compare national systems of law, but to analyse the problems and obstacles resulting from differences in systems of law in contract and commercial practice.” The Commission attaches particular weight to: (i) the “identification of real or likely obstacles in contract or commercial practice to the smooth running of the internal market and of competition imbalances resulting from the interaction of property law with non-contractual liability law and with contract law, under the different national systems”; (ii) “analysis of relevant jurisprudence and provisions as they relate to each issue identified”; and (iii) “all useful and relevant legal and factual elements, so that the Commission can verify the nature and magnitude of the obstacles identified”.<sup>1</sup>

2. **The Council meeting in Tampere and the Communication of the Commission** The significance of these questions emerges against the following background. In its conference in Tampere on the 15th and 16th October the European Council stressed that “[i]n a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal [...] systems in the member states.” The conclusions of the conference therefore set out in Chapter B.VII (“Greater convergence in civil law”), at paragraph 39, the conclusion that “[a]s regards substantive law, an overall study is requested on the need to approximate member states’ legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council should report back by 2001.”<sup>2</sup> The European Commission reacted to this on the 11th July 2001 with the publication of a *Communication to the Council and the European Parliament on European Contract Law*.<sup>3</sup> With this communication the European Commission placed the discussion about the questions touched on in Tampere on a broad foundation. However, the Commission’s

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<sup>1</sup> This is the description of the study contained in the Commission’s contract award notice SANCO 21st January 2003/B4(02)D/240401, OJ 2003 S 23-018434.

<sup>2</sup> [http://www.europarl.eu.int/summits/tam\\_en.htm#b](http://www.europarl.eu.int/summits/tam_en.htm#b)

<sup>3</sup> OJ 2001 C 255/1 (13th September 2001); see on this also *v. Bar*, Die Mitteilung der Europäischen Kommission zum Europäischen Vertragsrecht, ZEuP 2001, 799-804.

Communication only refers to contract law and the immediately adjacent areas, namely the law of unjustified enrichment and a narrow segment of non-contractual liability law.<sup>4</sup>

3. **Reactions** This narrowing of focus – deviating from the conclusions in Tampere – has been criticised in several important policy statements responding to the European Commission’s Communication.<sup>5</sup> Among these in particular is the resolution of the European Parliament on the 15th November 2001.<sup>6</sup> (See further para 5.)

4. **The Justice and Home Affairs Council** In addition the Justice and Home Affairs Council stated in its report from 16th November 2001 that it would be appropriate to investigate whether differences in the legal provisions of the member states in the fields of non-contractual liability law and property law prejudice the internal market. It therefore called on the Commission “to conduct a study into whether the differences in member states’ legislation, in the areas of non-contractual liability and property law, constitute obstacles to the proper functioning of the internal market in practice”.<sup>7</sup> The Commission likewise considers that such a study is worthwhile and has commissioned us to conduct it. Our task is, however, limited to answering the questions set out in paragraph 1 and hence is aimed at a different issue than the remit which the Justice and Home Affairs Council contemplated in its report. This study does *not* deal with the whole gamut of the problem whether the differences between the various laws of tort and property of the member states of the European Union give rise to impediments to the internal market or produce inequalities of treatment relevant to competition. Contained within that overarching issue are a whole host of problems, which would have to be the subject of a separate, further study and at any rate have not been tackled by us. One thinks for, example, of the negative repercussions for the free movement of persons arising from the existence of different systems of compensation for accident victims, in particular victims of traffic accidents. Another example would be the impact of property law or tort law rules on decisions as to where to locate and operate a business. A further instance that springs to mind are the repercussions of these rules for the free movement of capital. A further instance may be found in the barriers to competition from the different burdens generated by liability for environmental damage. One may point, too, to the repercussions of different levels of protection of personality rights on the free exercise of

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<sup>4</sup> Paras. 12 and 13 of the Communication.

<sup>5</sup> See in particular from the realm of academic policy statements the Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code, submitted on behalf of the two groups by *von Bar* and *Lando* in collaboration with *Swann*, published *inter alia* in ERPL 2002, 183-248.

<sup>6</sup> European Parliament resolution on the approximation of the civil and commercial law of the member states (COM(2001)398 – C5-0471/2001 – 2001/2187 [COS]); printed in OJ 2002 C 140E/538 (13th June 2002) (also reproduced in German in: ZEuP 2002, 634-640); see on this *v. Bar*, Die Resolution des Europäischen Parlaments vom 15. November 2001 zur Annäherung des Zivil- und Handelsrechts der Mitgliedstaaten, ZEuP 2002, 629-633.

<sup>7</sup> Draft Council report on the need to approximate member states’ legislation in civil matters, 13017/01, para. 21(c). The document is available on the internet at: <http://register.consilium.eu.int/pdf/en/01/st13/13017en1.pdf>.

journalism, and also to the barriers to competition, which may arise from different regimes for liability in the area of advertising. The impediments hindering the organisers of large international meetings constitute another instance. One thinks, too, of the negative repercussions of the very differently structured personal liability of employees to third parties in the law of tort on the flexibility of labour. Accordingly, looking at problems of this sort, no conclusions can be drawn either one way or the other that different tort law regimes, or as the case may be different property law regimes, do or do not hinder the internal market. The former proposition appears to us to be probably the case, but we have not gone into this wider issue. The European Commission must itself come to a view as to whether it will rest content with the answers that we have given, answers that are *solely concerned with the interference problem* and whether it wishes to go beyond the scope of this study and to devote its attention also to problems of delict and/or property law at large.

5. **The approach of the European Parliament** Another part of the background to our study are the ideas on the future of European private law developed by the European Parliament. In two resolutions, in 1989 and 1994 respectively, the European Parliament has spoken out in favour of starting preparations for the creation of a European Civil Code.<sup>8</sup> In its resolution of 15th November 2001<sup>9</sup> the European Parliament no longer used the term “European Civil Code”, but it nonetheless puts forward an ambitious action plan for the development and creation of a European law of obligations and property.<sup>10</sup> This embraces non-contractual liability law and parts of property law. Moreover, the European Parliament’s Committee on Legal Affairs and the Internal Market in its report responding to the Commission’s Action Plan (which report underpinned the Parliament’s resolution of 2nd September 2003 welcoming a common frame of reference and advocating optional instruments)<sup>11</sup> has again expressly repeated its wish that non-contractual liability law, and at least moveable property law, and the law of trusts be given due consideration in the further work to be carried out.<sup>12</sup>

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<sup>8</sup> OJ 1989 C 158/400 (reproduced in: ZEuP 1993, 613); OJ 1994 C 205/518 (reproduced in: ZEuP 1995, 669).

<sup>9</sup> See fn. 6 above.

<sup>10</sup> Para. 14 of the Resolution.

<sup>11</sup> European Parliament Resolution on the Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan (COM(2003) 68-2003/2093(INI)). P5\_TA(2003)0355. The resolution is published on the website of the Parliament (<http://www.europarl.eu.int>).

<sup>12</sup> Report on the Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan (COM(2003) 68-2003/2093(INI)). Rapporteur: Klaus-Heiner Lehne. 9th July 2003. A5-0256/2003. The report, which is also published on the website of the Parliament (<http://www.europarl.eu.int>), contains an “explanatory statement”, which at II(1)(b) reads: “In its last resolution the European Parliament regretted that the Commission communication was confined to the law of contract and called for it to include general contract law, the law on sales contracts, the law governing service contracts including financial services and insurance contracts, the law governing personal securities, the law governing non-contractual obligations (tort, law of restitution), the law

6. **The Economic and Social Committee** The Economic and Social Committee has expressed a similar viewpoint and, among other things, has drawn attention to the fact not merely that it are the legal problems arising during contract negotiations (so-called pre-contractual liability) which are to be considered,<sup>13</sup> but also that, in the interest of consistency of the legal system as a whole, the initiatives for creating a European contract law should possibly be extended to other areas – especially that of non-contractual liability law.<sup>14</sup>

7. **The European Commission's Green Paper on the Rome Convention** On 14th January 2003 the European Commission published a Green Paper on the conversion of the Rome Convention of 1980, on the law applicable to contractual obligations, into a Community instrument, and on its modernisation.<sup>15</sup> The Green Paper explicitly considers the relationship between the planned modernisation of the European private international law of contract and obligations, on the one hand, and the harmonisation of substantive private law, on the other. With an eye to contract law it makes the following assessment: "There are those who are already considering the link between Rome I and the European contract law project. The Commission communication of 2nd July 2001 aimed at broadening the discussion on the future of European contract law at Community level and on the need for a change of approach regarding the substantive law. In this paper the Commission in particular raised the issue of coherence of the EC *acquis* in the area of contract law and whether divergences in contract law between the member states may hinder the proper functioning of the internal market. One of the options put forward, if a new approach turned out to be needed, was the adoption of a new Community instrument contributing to further approximation of the substantive law of contracts. Thus some commentators already called into question the value of working on rules prescribing the application of one or the other national rule. There is, however, no reason for such questioning. In the Commission's opinion, the 'European contract law' project does neither aim at achieving the uniformity of contract law nor at the adoption of a European civil law code. The Commission had already announced that a follow-up document would be published early in 2003. In addition, even assuming that one day there will be

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governing the transfer of ownership of moveables, the law governing credit guarantees in moveables and the law on trusts. The European Council of Tampere did not restrict itself to contract law either. Indeed the Council in its statement on the first Commission communication, called for a study to be drawn up on the law of tort and the law of property. It is therefore hard to understand why the Commission does not realise that it is possible for the frame of reference and other measures to go beyond the field of contract law. A clarification to this effect would be welcome, particularly since negotiations in the Convention have not imposed any such restrictions."

<sup>13</sup> OJ 2002 C 241/1 (7th October 2002), para. 3. 7.

<sup>14</sup> Loc. cit., para. 2. 1. 3. Compare also the Opinion of the Economic and Social Committee on the "Proposal for a Council Regulation establishing a general framework for Community activities to facilitate the implementation of a European judicial area in civil matters", OJ 2002 C 36/77 (8th February 2002).

<sup>15</sup> COM(2002) 654 final. The document is available on the internet at: [http://europa.eu.int/comm/off/green/index\\_en.htm](http://europa.eu.int/comm/off/green/index_en.htm).

closer harmonisation of contract law in the Community, it is quite possible that this will concern only certain particularly important aspects and that the applicable law will still have to be determined for the non-harmonised aspects. Conflict of laws' rules will therefore lose none of their importance for Community cross-border transactions, today and in the future. Accordingly, the European contract law project does not detract in any way from the arguments for considering a possible modernisation of the Rome Convention. On the contrary, both projects complement each other and will be conducted in parallel."<sup>16</sup>

8. **Principles as applicable law?** Under heading no. 3.2.3. "Freedom of choice (Article 3(1) – Questions regarding the choice of non-state rules" the Commission's Green Paper addresses the questions posed in these terms: "It is common practice in international trade for the parties to refer not to the law of one or other state but direct to the rules of an international convention such as the Vienna Convention of 11th April 1980 on contracts for the international sale of goods, to the customs of international trade, to the general principles of law, to the *lex mercatoria* or to recent private codifications such as the UNIDROIT Principles of International Commercial Contracts. In the minds of the authors of the Convention, such a choice does not constitute a choice of law within the meaning of Article 3, which can only be choice of a body of state law: a contract containing such a choice would be governed by the law applicable in the absence of a choice (Article 4), and it would fall to this law to determine the role to be played by the non-state rules chosen by the parties. Traditionally, most academic writers have ruled out the possibility of choosing non-state rules, particularly because there is not yet a full and consistent body of such rules. Others would prefer the choice of non-state law to constitute a choice of law for the purposes of Article 3 of the Rome Convention. One of the reasons brought forward to this is that one should not refuse a practice before the court that is already admitted (in many countries) before arbitrators. Concerning more specifically the parties' choice of the rules of the Vienna Convention of 11th April 1980, the Dutch courts have twice ruled on situations in which the Convention did not apply directly pursuant to its Art. 1(1). According to the Hoge Raad, the Dutch Supreme Court, the parties were free to designate this Convention as the law applicable to their contract. There is still the question of the effects of such a designation: if the contract had been purely internal, the rules of the Convention could not have derogated from the mandatory rules of the law applicable in the absence of a choice. But since the contract was an international contract, the Court acknowledged that the choice of the Convention ruled out the mandatory rules of the law applicable in the absence of a choice. It did not refer to the law which would have been applicable in the absence of a choice to ascertain the role that it would confer on the Vienna Convention. In other words the parties themselves had genuinely chosen this Convention." Against this background the European Commission invites experts to answer "Question 8: Should the parties be allowed to directly choose an international convention, or even the general principles of law? What are the arguments for or against this solution?" An answer to these questions is, however, outside the scope of this study. These results may be of direct importance to the discussion initiated by the Green Paper. The consideration is not too

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<sup>16</sup> Para. 1.6 of the Green Paper (pp. 11-12) (footnotes omitted).

remote that a real choice of general legal principles for the applicable law can only come into question when they are sufficiently complete and embedded into a complex of rules. That complex should take account of the problem of interaction between contract law and its neighbouring areas largely withdrawn from the autonomy of the parties.

9. **The Commission's Action Plan** In February 2003 the European Commission presented its Action Plan (referred to in the Green Paper just discussed) – again in the form of a Communication.<sup>17</sup> “This Action Plan suggests a mix of non-regulatory and regulatory measures [...]. In addition to appropriate sector-specific interventions this includes measures: (i) to increase the coherence of the EC *acquis* in the area of contract law, (ii) to promote the elaboration of EU-wide general contract terms, and (iii) to examine further whether problems in the European contract law area may require non-sector-specific solutions such as an optional instrument. In addition to continuing to put forward sector-specific proposals where these are required, the Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the EC contract law *acquis*, both in their drafting and in their implementation and application. Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all interested parties. This common frame of reference should provide for best solutions in terms of common terminology and rules, i. e. the definition of fundamental concepts and abstract terms like ‘contract’ or ‘damage’ and of the rules that apply for example in the case of non-performance of contracts. A review of the current European contract law *acquis* could remedy identified inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not foreseen at the time of adoption and fill gaps in EC legislation which have led to problems in its application. The second objective of the common frame of reference is to form the basis for further reflection on an optional instrument in the area of European contract law. In order to promote the elaboration by interested parties of EU-wide general contract terms, the Commission intends to facilitate the exchange of information on existing and planned initiatives both at a European level and within the member states. Furthermore, the Commission intends to publish guidelines, which will clarify to interested parties the limits which apply. Finally, the Commission expects comments as to whether some problems may require non-sector-specific solutions, such as an optional instrument in the area of European contract law. The Commission intends to launch a reflection on the opportuneness, the possible legal form, the contents and the legal basis for possible solutions”.<sup>18</sup>

10. **Sixth Framework Programme on Research** In its Communication the Commission points out that in commissioning this study it is reacting to the criticisms of the Parliament and the Council on the narrowing down of the previous width of deliberations to

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<sup>17</sup> Communication from the Commission to the European Parliament and the Council: A more coherent European Contract Law. An Action Plan, COM(2003) 68 final. The document is published on the internet at: [http://europa.eu.int/comm/consumers/policy/developments/contract\\_law/com\\_2003\\_68\\_en.pdf](http://europa.eu.int/comm/consumers/policy/developments/contract_law/com_2003_68_en.pdf).

<sup>18</sup> Executive summary of the Communication.

the field of contract law.<sup>19</sup> It also indicates that it intends to coordinate further works on the intended “common frame of reference” with the financial possibilities afforded by the sixth framework programme<sup>20</sup> for research.<sup>21</sup>

11. **Study on product liability** It emerges from the Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products<sup>22</sup> that it contemplates further harmonisation of product liability so far as this is based on liability in contract and in tort for negligence. A corresponding study has been commissioned and completed.<sup>23</sup>

12. **Study on consumer legislation** On 2nd October 2001 the European Commission issued a Green Paper on European Consumer Protection.<sup>24</sup> The most important question posed was whether reform should be pursued on the basis of the existing specific (sectoral) approach or a mixed approach which would include a general framework directive.<sup>25</sup> In the light of responses to this consultation the European Commission published on 11th June 2002 a follow-up Communication.<sup>26</sup> This Communication proposed the adoption of a mixed approach with further consultation on the details. Moreover, the Communication advocates the establishment of an academic group to carry out comprehensive comparative legal research – in particular to identify notions of fairness.<sup>27</sup> We permit ourselves to direct the Commission’s attention to some considerable work in this direction which has already been undertaken, amongst others by the Commission on European Contract Law.<sup>28</sup>

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<sup>19</sup> Para 63 and fn. 41 of the Communication.

<sup>20</sup> Decision 1513/2002/EC of the European Parliament and of the Council of 27th June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (OJ 2002 L 232/1, 29th August 2002).

<sup>21</sup> Para 68 of the Communication reads: “Research activities in the above-mentioned area could be supported by the Sixth Framework Programme for research and technological development (FP6). Within its ‘Integrating’ Programme, Priority 7 ‘Citizens and governance in a knowledge-based society’ presents the analytical and intellectual context for such an endeavour. It is envisaged that research activities in the domain of European Contract Law will be part of one of the first calls for proposals to be published within this priority. Given the nature of the issues at stake, the implementation could use one of the new instruments provided in FP6, in order to further structure and integrate the research efforts in this domain.”

<sup>22</sup> COM(2000) 893 final (31st January 2001).

<sup>23</sup> *Howells*, Product Liability – A History of Harmonisation, publication forthcoming in the 3<sup>rd</sup> edition of “Towards a European Civil Code” (2004); a copy of the article in typescript has been obtained by *v. Bar*.

<sup>24</sup> COM(2001) 531 final.

<sup>25</sup> Green Paper, Nos. 3.2-3.4.

<sup>26</sup> COM(2002)289 final.

<sup>27</sup> Communication, para. 41.

<sup>28</sup> *Lando/Beale* (eds.), *Principles of European Contract Law*, Parts I and II (2000); *Lando/Clive/Prüm/Zimmermann*, *Principles of European Contract Law*, Part III (2003).

13. **Strategy document** On the 22nd May 2002 the European Commission published a further Communication, namely “Communication from the Commission. A Project for the European Union.”<sup>29</sup> In this document the Commission emphasises the relationship between harmonisation of civil law and the smooth running of the internal market.<sup>30</sup>

14. **Consumer Policy Strategy 2002-2006** On the 7th May 2002 the European Commission issued a Communication to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions entitled “Consumer Policy Strategy 2002-2006”.<sup>31</sup> Here, besides outlining the need for the review of existing Community legislation for consumer protection, the Commission addressed the question of contract law harmonisation. “The follow-up to the Communication will respond to the requests of the Council and of the European Parliament [for communication of the results of the consultation and for an action plan]. It could suggest a mix of regulatory and non-regulatory measures. Among the non-regulatory measures it could propose co-ordination of research activities. These activities could lead to the elaboration of a general frame of reference, establishing common principles and terminology. Furthermore it could explain which measures would be taken to ensure coherence of the existing and future acquis, taking into account the general frame of reference.”<sup>32</sup>

15. **Information campaign** Furthermore, following a call for tenders in November 2002, the European Commission has awarded a contract for the launch of “an information campaign to make legal practitioners more aware of judicial cooperation in civil matters within the European Community.”<sup>33</sup> The total budget for this twelve-month campaign or “advertising” amounts to some € 830,000 (estimated).

16. **Rome II** Meanwhile, it is being seriously contemplated that a unification of the conflict of law rules determining the law applicable to non-contractual obligations should follow the unification of conflict of law rules determining the law applicable to contractual obligations.<sup>34</sup> If this does happen, the legislative instrument will probably be a Regulation. The Regulation proposal is known under the short title of “Rome II” (“Rome I” being the corresponding short title for the Rome Convention on law applicable to contractual obligations).<sup>35</sup> The proposal contains in chapter 2 (Section 1:

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<sup>29</sup> COM(2002) 247 final.

<sup>30</sup> The text reads: “The extent of harmonisation of civil law hinges on the cross-border dimension of certain operations and on the need to ensure that the internal market runs smoothly” (loc. cit., p. 10).

<sup>31</sup> COM(2002) 208 final.

<sup>32</sup> Loc. cit., p. 14. See also the annex at p. 30.

<sup>33</sup> OJ 2002 S 216-171329 (7th November 2002); OJ 2002 S 236-187566 (5th December 2002); OJ 2003 S 143-129419 (29th July 20003).

<sup>34</sup> See the Consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations (“Rome II”), COM (2003) 427, published on the internet at: [http://europa.eu.int/comm/justice\\_home/unit/civil/consultation/index\\_en.htm](http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm).

<sup>35</sup> On this and the plans for its revision and implementation by way of a Regulation, see above paras. 7-8.

Rules applicable to non-contractual obligations deriving from a tort or delict) the following proposals which are relevant to this study:

Article 3 – General rule

- (1.) The law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.
- (2.) However, where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.
- (3.) Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country the law of that other country shall apply. *A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation.* (italics added)

Article 4 – Product liability

Without prejudice to Art. 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.

Article 5 – Unfair competition

- (1.) The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected.
- (2.) Where an act of unfair competition affects exclusively the interests of a specific competitor, Art. 3(2) and (3) shall apply.

Article 6 – Violations of privacy and rights relating to the personality

- (1.) The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Art. 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.
- (2.) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.”

Art. 3 (3) of the proposed Regulation is of particular interest for this study because it also shows the connection between contract and tort law at a conflict of laws level. If tort law is taken to be an adjunct of contract law, then it is only another way of saying that, for the purposes of conflict of laws, in the area of overlap tort law is a part of contract law. The substance of this rule on the correct connection of tort law could also be achieved by a corresponding extension of the catalogue of questions determining the point of connection to “contract law” within the framework of “Rome I”. Finally, Article 10 (1) of the proposal provides the possibility of a free choice of law – only, however, “by an agreement entered into *after* their [i. e. the parties] dispute arose.”

17. **Working group on mortgage loans** Finally, the European Commission on the 12th of May 2003 set up a working group which “should bring clarity about the threshold hurdles and offer recommendations for the realization of an effective internal market for mortgage loans”.<sup>36</sup>

## II. The Problems

18. **Initial considerations for this study** This study is intended as a contribution to the broader process of policy formation. In substance it is geared towards the strived-for “common frame of reference” and it proceeds from the assumption that the project of unifying the European Union’s private law, or at any rate its contract law, will remain on the agenda for a long time. However, the study is not concerned with a comparative reworking of contract legal systems in the European Union, but rather targets the border areas between contract law, on the one hand, and tort and property law on the other. It addresses the question – not least on account of the conclusions of the European Council and the resolution of the European Parliament – whether an approximation of contract law without including important component parts of non-contractual liability law and property law is meaningful or sufficient. That is because all considerations about the approximation or harmonisation of *the* contract law in the European Union naturally commence with the question what is to be understood in this context as constituting contract law. The fundamental problem is that so far there is not even a uniform answer to this question. First tentative models of European contract law have been and are being developed in legal scholarship.<sup>37</sup> Moreover, some important conceptions can be found in the Rome Convention on the law applicable to contractual obligations,<sup>38</sup> mentioned above, and in Council Regulation 44/2001/EC of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>39</sup> However, these concern the area of private international law and private international

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<sup>36</sup> Frankfurter Allgemeine Zeitung, 13th May 2003, S. 19.

<sup>37</sup> In particular from the Commission on European Contract Law (see fn. 27 above) and from the Study Group on a European Civil Code (information about it in the Joint Response mentioned in fn. 5; first publication from the work of the Study Group are expected at the end of 2004). See further *Gandolfi* (coördinateur), Code Européen des Contrats I (2002).

<sup>38</sup> OJ 26th January 1998 C 27/01, p. 34.

<sup>39</sup> OJ 16th January 2001 L 12, p. 1.

procedural law and are therefore no substitute for a concept of substantive law. For both areas of law the greatest difficulties regularly arise in the demarcation of the boundaries between contract and tort law.<sup>40</sup>

**19. Absence of a uniform concept of contract law** The absence of a uniform legal notion of contract law is further examined in this study in the following part. For present purposes it is important to appreciate that this deficiency can be considered as one of the key problems for further legislative measures on a European level. If the private legal systems of the European Union member states were placed on top of one another like transparencies, one would ascertain that there is only a relatively small core of legal questions which qualify in all systems as belonging *exclusively* to contract law – meaning that no connections to or overlaps with (“interference” with) bordering legal areas appear. Even with the simplest of questions about contract law (deficient delivery of goods, delay in performance, etc) references to non-contractual liability can not be excluded. It may turn out that in such cases one is concerned with “pure economic losses” (in the sense of the taxonomy of tort law described below in more detail)<sup>41</sup> and it could be for that reason alone that they are not subject to tort law (as is the case for example in § 823 (1) of the German BGB or art. 483 (1) of the Portuguese CC), or simply that a relevant tort in the Common law sense is lacking, but with these possible explanations the problem does not disappear. This is because in the countries which have a general clause on tort law liability, an (unwritten) rule governing concurrence of actions ultimately provides for the displacement of tort law from these complexes of questions, and (to pursue the illustrations just given) in German and Portuguese law it is only the specific interpretation of the statutory concept in the context of tortious liability for the violation of “protective legislation” which prevents an overlap: statutory provisions which compel a contractual debtor or other obligor to correct discharge of the debt are not considered as constituting statutes in the sense of legislation whose infringement can give rise to delictual liability on account of violation of protective laws.<sup>42</sup> In Dutch law too it would be conceivable in principle to interpret a breach of contract as an infringement of a right in the sense of Art. 6:162 (1) BW. Only from the separate regime of liability for the breach of contractual obligations in Articles 6:74 ff. BW does it emerge that this enjoys a fundamental priority of application over articles 6:162 ff. BW.

<sup>40</sup> Impressive examples are provided by the case law of the ECJ on the product liability of a French manufacturer in the case of a chain of contracts (ECJ 17th June 1992 – C-26/91 – *Handte v. TMCS*, ECR 1992, I, 3967 = JZ 1995, 90 = Rev. crit. dr. i. pr, 1992, 726 = Riv. dir. int. priv. proc. 1993, 451 = NJ 1996 no. 316), on liability due to culpa in contrahendo (ECJ 17 September 2002, – C-334/00 – *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH*, EuZW 2002, 655 = IPRax 2003, 143) and on liability arising from a misleading announcement of profits (ECJ 11th July 2002 – C-96/00 – *Gabriel* IPRax 2003, 50; see on this *Leible*, *Gewinnbestätigung aus Luxemburg. Zur internationalen Zuständigkeit bei Gewinnmitteilungen aus dem Ausland*, IPRax 2003, 28-34).

<sup>41</sup> See below at paras. 46-47.

<sup>42</sup> See *v. Bar*, *The Common European Law of Torts I* (1998), paras. 419-425.

A good illustration of this whole problem is supplied by Austrian law. Here it is asserted – although the details may be controversial – that the unlawfulness of a given conduct arises from the breach of either contractual or tortious obligations.<sup>43</sup> Furthermore, reference must be made to § 1295 (1) ABGB, by which compensation for breach of contract is located, as a matter of taxonomy, within the framework of tort law (“[...] the damage may have been caused by breach of a contractual duty or without any relation to a contract”).<sup>44</sup> Likewise dealt with in tort law is one of the most important cases of breach of a sales contract, namely delay in payment. § 1333 ABGB, which covers this question, is found in the chapter on “types of damage” in section 4 (“On Patrimony”) and deals with compensation for damage arising “in particular by delay in payment”.

**20. The structure of the interference problem** Even with a “minimalistic” mode of proceeding in the sense already mentioned, a number of further difficulties in all likelihood immediately emerge. These are all connected to the second key problem which is that a bare unification of the material recognized as constituting contract law would leave the national legal traditions in the bordering legal subjects unaffected. This in turn might result in the enduring impairment of the success of unifying the law by such a measure.<sup>45</sup> This study is about these problems and their effect on the normal functioning of the internal market.

It appears to us important to refer at this early point in the study to the fact that issues that arise from the interaction of contract law on the one hand and the law of delict and the law of property on the other should not only be considered

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<sup>43</sup> *Koziol*, *Haftpflichtrecht* II<sup>2</sup> (1984) 4. It is disputed, however, which method of determining unlawfulness is to be adopted. If it is done on the basis of a result-orientated concept of unlawfulness, then the breach of contract as such establishes the unlawfulness (*Rummel* [*-Reischauer*], *ABGB* (1992), § 1294 nos. 2, 8 and 15). However, if one follows a conduct based analysis (as is the predominant view in Austria, in particular *Koziol*, *Haftpflichtrecht* I<sup>3</sup> (1997) 4/40, p. 157 and above all OGH 8th September 1954, *SZ* 27/220 as well as OGH 10th January 1991, *JBl* 1991, 385), then a non-performance of a contractual obligation only establishes unlawfulness if this is based on a breach of duties of care.

<sup>44</sup> See *Schwimann* (*-Harrer*), *ABGB* VII<sup>2</sup>, Preliminary comment 1 to §§ 1293 ff ABGB: This equal treatment is correct in so far as Austrian compensation law is based on the basic elements of wrong and fault. *Koziol* takes the view in *Haftpflichtrecht* I<sup>3</sup>, 4/42, p. 158 and 17/9 p. 526, and in *Delikt, Verletzung von Schulverhältnissen und Zwischenbereich*, *JBl* 1994, 209-223 (209 f), that the liabilities from contract and tort are only the final links of a chain. The span in-between to be dealt with using combined value judgments from both legal areas. This view has been adopted to a large extent in OGH 11th July 2002, *JBl* 2003, 44 (with note by *Rummel*).

<sup>45</sup> See, amongst others, *Tilmann*, *Eine Privatrechtskodifikation für die Europäische Gemeinschaft?*, in: Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*<sup>2</sup> (1999) 579, 590; *Basedow*, *Das künftige europäische Privatrecht: Der hybride Kodex*, *AcP* 200 (2000) 445, 474 and (albeit with partially different conclusions) *Kronke*, *Brauchen wir ein europäisches Zivilgesetzbuch?* (2002) 8.

because they may cause *additional* impediments to the internal market, i. e. internal market problems, which are not caused solely by differences between Member States' contract law regimes. As and where different law acts as a barrier to the full utilisation of the possibilities that are offered by the internal market, these impediments very often are not eradicated just by harmonising the legal rules which are regarded as rules of contract law. There are, indeed, a number of legal questions, which all or some legal systems characterize both as within contract law and at the same time within tort law. A successful harmonization can, accordingly, only be achieved and the corresponding barrier to the internal market can only be effectively removed, if either the corresponding domestic tort law is declared to be inapplicable or alternatively harmonised as well.

21. **Examples in the relationship of tort law to contract law** As regards the relationship between contract and tort, if, for example, questions with regard to the liability of a representative acting without authority (a *falsus procurator*) are regarded as constituting a part of contract law, and as such could be harmonised – for instance, by following the model of the Principles of European Contract Law (PECL)<sup>46</sup> – this alone would not exclude the false representative from being liable according to the rules of the (non-harmonized) law of torts in some member states. In consequence a uniform liability regime for cases of this type would not be created. At least an additional provision would be required to the effect that (autonomous) tort law is inapplicable in cases of this sort. However, even that would in substance be a *tort law* rule, which for its part would have to be fitted into the general structure of extra-contractual liability law. Against the same background, for example, legal questions in connection with incorrect credit information given by a bank or legal questions in connection with incorrect expert evaluations, for example, would remain an almost unsolvable problem. That is because it would be practically immaterial to the success of legal harmonisation whether European contract law gave a positive or a negative answer to the question, whether, as between an enquirer and a supplier of information, a contract comes into existence on responding to the enquiry which can give rise to liability for the defectiveness of the information. If the answer is positive, the final outcome of the case would still depend upon national rules with regard to concurrence of actions and upon the detail of the relevant tort law. If the answer is negative, liability would be decided solely according to the non-unified rules of the different national tort law systems. Furthermore, even at this early stage reference must also be made to the complex problem of product liability. To date there has been no harmonisation as regards relations between businesses, and in relation to the consumer there is neither harmonised contractual liability nor harmonised liability for negligence.

Additional illustrative material on this problem has long been provided by experiences with the CISG. It has been discussed for a long time, whether the provisions of the CISG (for example, on the buyer's requirement to give notice of defects (art. 39) and the foreseeability of the extent of the damage (art. 74)) exclude the application of parallel national tort law regimes in the case of consequential harm caused by a defect. The question is overwhelmingly answered

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<sup>46</sup> See above at fn. 26.

in the negative – with the consequence that the harmonisation of law for this problem is in practical terms clutching at thin air.<sup>47</sup> With the development of a European law of sales, such a situation should be excluded from the outset. It should be established beyond doubt, that an exporter of goods whose principal place of business is in country A does not run different liability risks depending on whether it delivers goods in member state B or member state C. It is probable, that, knowing that there is a relatively more severe regime of tortious liability in some particular state to which it aims to export, it will only do so in that instance at a higher price, or business dealings with such countries will simply be minimised or foregone altogether. The responses to our questionnaire to business and commerce have demonstrated that business success is the consideration that is very much in the forefront of decision-making and that businesses do not let themselves be deterred from export by, or at any rate not exclusively deterred from export by, rules relating to liability in tort. On the other hand, it appears that in fact people may operate in a way that either they are quite unconscious of liability risks, or so that they believe that it is possible to counter them by way of a clause exempting from liability and by way of taking out insurance. Other branches of the business and commerce can obviously be affected in a different way, for instance the insurer itself. Generally it may be said that awareness of legal problems which arise out of the interaction of contract law on the one hand and tort or property law on the other is comparatively slender. Many responses confine themselves to general observations without going into the particulars of the questions posed.

22. **Peculiarities of tort law** Tort law naturally comes still more markedly into view if the “minimalistic” approach described above is abandoned and a definition of contract law is developed which is driven instead by principles. Incongruities between a European notion of contract and the existing national legal systems would in all probability be completely inevitable. One example among many is the problem (oscillating between contract and tort law) of liability for fault at the stage of conclusion of the contract. Another example is liability for injuries to the person or damage to property as a result of incorrect performance of contractual duties. It appears to be neither possible to solve problems of this kind consistently and exclusively within a contract law context, nor does it appear possible to make do completely without the qualification “contractual” or “tortious”. The distinction between these two regimes is a firm component of the European law tradition and should not be given up without due consideration. However, at the same time it seems that a merely partial inclusion of tort law questions (and the exclusion of all others) would be not only less plausible, but in terms of the technical formulation of rules probably even not possible. Tort law in general develops from a few basic maxims which are applied equally in all of its component areas. This applies in particular to liability for negligence, but on closer scrutiny can be seen to be true also for the residual content up to and including strict liability. From this derives the fear that a sectoral harmonisation of tort law limited to particular fields of activity or particular risks might not as a rule promise long-term success. Not even product liability, which has been

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<sup>47</sup> Herber, *Mangelfolgeschäden nach CISG und nationalem Deliktsrecht*, IHR 2001, 187-191; Dirk Schneider, *Un-Kaufrecht und Produktehaftpflicht* (1995), passim.

the flagship of European tort law harmonisation until now, is really an exception. Naturally there are tort law issues in which the interference problem does not appear because no matters of contract law come into view. One only has to think of a typical accident between strangers. However, if tort law is viewed as a systematic entity, then even these cases can not be consistently separated from the discussions. They too must be coordinated with the regulations which are at the centre of the interference problem.

**23. Further aspects of the interference problem** On a complete examination of the interference problem in the relationship between contract and tort law, a further set of difficulties appear. A particular part of these difficulties is the fact that there is a not insignificant number of cases in which the presence of a tort constitutes a breach of contract, and, in given circumstances, even in cases in which the tort is directed against a third party. A bank cashier, for example, must be absolutely trustworthy. It is conceivable that the cashier's bank might permissibly dismiss the cashier because in his private life the cashier has committed a tortious act to the detriment of a third party – for example fraud or embezzlement. The third party need not even be a customer of the bank. In a whole series of cases it may turn out that the commission of a tort to the detriment of the contracting partner establishes the invalidity of the contract between the two parties and with this the obligations to perform disappear. In Austrian law, for example, medical intrusions upon the bodily integrity of a patient without sufficient previous explanation are unlawful and do not merely entitle the patient to compensation. If a consent to the medical activity which is effective in law is lacking, the contract for the treatment also becomes void, which in turn entitles the patient – in addition to reasonable compensation for non-economic damage – to demand re-payment of the fee paid, subject to set-off for benefits received.<sup>48</sup> An impediment to the internal market requires attention in cases of this type, if patients who were insufficiently informed, in some countries but not in others have a claim for the repayment of fees paid. That could adversely impact on the policy of free movement of patients in Europe. On the other hand, however, it is necessary to appreciate that different characterisations of exactly the same legal question do not necessarily lead to different outcomes. It can instead transpire that a different characterisation constitutes the basis for two neighbouring legal systems coming to the same outcome in an individual case.

For instance a patient (irrespective of his or her nationality) who is treated in a German hospital and under German law has no *unjustified enrichment* claim to repayment of fees paid if the patient has been given insufficient information. However, if one follows the approach of the Berlin Kammergericht he or she would have a valid claim on the basis of contract for *compensation* that is focussed on releasing him or her from the obligation to pay. In the result such a claim is almost identical to a claim based on unjustified enrichment.<sup>49</sup>

No less frequently, however, the opposite phenomenon is found whereby a tort is only present because there has been a breach of contract (see further on this problem below

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<sup>48</sup> OGH 4th July 1991, JBl 1992, 520, note *Apathy*.

<sup>49</sup> KG 21th September 1999, NJW 2000, 35.

Part One, chapter IV, and Part Three, chapter II). The majority of cases relevant in everyday practice in this respect seem to be concerned with omissions. Even if proceeding in the area of tort law from the basic rule that omissions alone do not amount to a tort, the failure, in breach of contract, to discharge duties to safeguard and supervise can assume relevance not only for the contracting partner, but also for the injured third party. The existence of a valid contract with a third party can be the reason for the proposition that an obligation is now also incumbent on the contracting party to monitor premises or supervise persons. In addition, to take another example, the presence of a contract may justify conduct which would otherwise be tortious. A case in point is where a tenant makes use of property of the landlord made available to him. The associated wear on the objects is not regarded as unlawful property damage under tort law.

**24. The passing on of information** Converse situations are also conceivable, whereby a breach of contract is precluded because the required action would represent a tort against a third party. The Common Law for example has a very strict law of defamation. The passing on of a suspicion, for instance, which one would expect between trusting co-operating parties to a contract, can thereby be prevented. The same is true for the other national tort law systems which have developed the so-called *Kreditgefährdung* – the assertion or publication of a false statement likely to endanger the credit of another or to have other disadvantageous financial consequences.

**25. Determining who is liable** In addition, it is often the case that the answer to the question of who is *gardien* or keeper of a thing depends on a contractual agreement between the defendant and a third party.<sup>50</sup> Furthermore, depending upon which legal system applies, a bare sales contract may transfer the ownership of an object immediately, with the consequence that directly after the conclusion of the contract, the buyer assumes the owner's liability in tort law.

An impressive example of this is to be found in Cass.civ. 3 March 1964.<sup>51</sup> The defendant bought a house at an auction taking place at the house. When people moved into the sitting room, where furniture was to be auctioned, the floor collapsed. The defendant as owner was found liable under Art. 1386 French CC. *This example demonstrates in what diverse respects measures for harmonisation of law in the area of the law of contract can also impact on the law of non-contractual liability and property law. The example becomes relevant to the internal market once the liability of an owner under the French law of delict is compared with liability in German law (§ 836 BGB), which depends on possession (or with liability in English law which depends on the proof of fault). For a German or for an English buyer of the house such a form of liability would come as a "unwelcome surprise". It would be the more so as he may well not have taken out any liability insurance at all. How could he insure in his home country for liability specifically in connection with an object which he did not know on his journey to*

<sup>50</sup> Cass.civ. 12th December 2002, D. 2003 Jur. 454, note Damas ("Le locateur d'un bien dont la garde lui a été transférée est responsable du dommage causé par ce bien en application de l'art. 1384, al. 1er, c.civ. ").

<sup>51</sup> Bull. civ. 1964, I, no. 125, p. 94 = D. 1964 Jur. 245.

*the auction he would buy? Even in the improbable case that he were to have been conscious of the legal position that could potentially arise, insurance would scarcely be a possibility. He would simply not find an insurer in his home country who offers policies of insurance covering such cases. Representatives from the German insurance sector have expressly confirmed that to their knowledge such a risk is, in Germany at least, not insurable.*

**26. Economic contexts** The interference problem between contract and tort law can be seen from an economic point of view as well as a purely legal one. This is substantially connected to the fact that when a business engaged in export or import contemplates whether or under which conditions it should conclude a contract, it always has to consider which consequences the conclusion of the contract can have in respect of possible liability vis-à-vis third parties.

A party submitting a construction plan for a building or offering to erect it, for example, must know what risks of liability in relation to third parties are involved, what the liability consequences would be if it later emerges that the building site was unsuitable or perhaps even contaminated, and whether neighbours can raise objections. A newspaper which 'buys' stories from an informant can only estimate their worth if it knows the risk of liability in defamation. It appears probable that precisely because of the uncertainty in respect of the legal position in the country where the service is to be provided the potential service provider may be induced to offer their services predominately in their own country, and only hesitantly to develop markets elsewhere.

Our second questionnaire has confirmed this assessment in so far as one national association of regional newspapers attaches importance to the fact that liability under all circumstances is to be governed by their own national law. The risk of falling into a foreign regime of liability is regarded as a serious danger for the national freedom of the press. Representatives of the insurance sector of one country also attach great importance to the question of liability to third parties. Liability insurers who insure parties undertaking business abroad are continually confronted with this problem. Since the questions addressed have direct repercussions for the occurrence of the insured event and the amount of damage, determination of the circumstances is integral to insurability. A business association from the industrial and commercial sector merely points out with regard to liability to third parties that the determination of diverse standards of safety and norms is (globally) quite common.

**27. Examples in the relationship of property law to contract law** The boundaries between contract law and property law likewise vary from country to country. This has direct impact on the creation of rights *in rem* by a contract. According to one approach, as soon as a contract for the creation of a right *in rem* is concluded, that right *in rem* exists as between the parties to the contract. However, to have effect in relation to third parties (in particular the creditors of the transferor and the creditors of the transferee), a further additional extrinsic act is needed, such as the transfer of possession, the entry into a register, etc. According to a different approach, the substantive effect of a transfer even between the parties of the contract first takes effect only when the additional extrinsic

act is carried out. A direct consequence of these different views could be that the time at which the right *in rem* arises is determined differently in the various legal systems. A further important difference lies in the answer to the question whether the validity of a right *in rem* is indeed dependant upon the validity of the contract on which it is based (e. g. a contract of sale or a contract for security) – the so-called causal view – or whether it is not – the so-called abstract view. The consequence of this difference is that following the first alternative, the validity of a right *in rem* cannot be determined simply according to the conditions for the creation of this right. Rather the validity of the contract forming the basis of the right (e. g. a contract of sale or a contract for security) also has to be examined. According to the second alternative, by contrast, it is sufficient just to examine the valid creation of the right *in rem* – an easing of the burden for the transferee, as well as for general commerce with legal rights. A further aspect of the dovetailed nature of contract law and property law is presented in the case of security rights by the question whether or not the content of a proprietary security is dependant upon the content of the secured contractual right (i. e. whether the former is accessorial). Finally, the matter of the dovetailed nature of contract law and property law is also raised in the case of security rights in their enforcement by the creditor, because the creditor may be compelled, for example, first of all to rescind the contract forming the basis of the security contract on account of the debtor's late payment (or to invoke the corresponding legal remedies of the national legal systems, such as for example, his right to terminate), or because the time-barred limitation of the secured contractual claim can impact on the enforceability of the proprietary security.

**28. Examples in the relationship of trust law to contract law** There are also countless points of connection between the Common Law's trust law and contract law, as a subsequent chapter explains in more detail. The primary significance of identifying a trust relationship lies in the "superadded" value which, from the obligee's point of view, the existence of a trust confers when compared with a mere conventional contractual (debtor-creditor) relationship. Since the interest of a beneficiary under a trust confers on that beneficiary protection in the event of the trustee-owner's bankruptcy or (in certain circumstances) his unauthorised transfer of the trust property to a third party, it will often be in the interest of an obligee to establish that the undertaking of the obligor has given rise to a trust rather than (or in addition to) a contractual relationship. (On a less fundamental, but – from a practical viewpoint – no less material level, there are also differences in the law of limitation of actions which may make the contract/trust status of an obligation critical to the value of an entitlement.) A case in point is where funds are advanced under a contract of loan to be applied for an agreed specific purpose. The effect of the agreement may be to superimpose on the contract a trust of the funds which has the effect of protecting the lender from the borrower's other creditors in the event that the latter is declared bankrupt before the funds are disbursed. There are thus clear parallels with the interrelationship of property law and contract law in this field since the specially protected nature of a beneficial interest under trust law is invoked here in order to achieve a special form of secured lending. More widely, there are interconnections between trust law and contract law in the area of assignment of (and agreements to assign) contractual rights and the enforcement of third party rights. Here again trust law performs a complementary role, supplementing (shortcomings in) contract law; indeed it

may be said that the former is parasitic on the latter and moulds itself to the content of contract law. This can also be seen in the notion of a so-called constructive trust which arises derivatively where one party has a specifically enforceable contractual right to a transfer of that other's property. The passing of beneficial ownership and risk are intimately tied to trust law principles so that a purely contractual analysis of the parties' legal positions would give a very deficient impression of the totality of rights and duties.

29. **The interference problem and its relation to obstacles to the exploitation of the internal market and distortions of competition** Opinions are divided on the question whether, and to what extent, the differences at any rate in the *contract law* systems of the member states of the European Union make it more difficult for economic participants to exhaust the aspired possibilities of the internal market and, possibly, even cause distortions of competition. The situation probably differs depending on whether retail business or contracts between enterprises are in issue.<sup>52</sup> Until now there have been no detailed empirical economic analyses.<sup>53</sup> These gaps cannot be filled by this study. As regards contract, tort and property law, treated in isolation, we believe that two earlier studies have already shown it at least to be plausible that there is a high probability of such hindrances for the good functioning of the internal market.<sup>54</sup> The European Commission is already acquainted with both studies and we merely make reference to them here. In addition, the European legislator has based practically every Directive for the protection of the consumer which it has enacted concerning questions of private law on the proposition that legal differences within this area can lead to distortion of competition. This justifies, along with the particular question which was put to us, that our study concentrates to that extent on the additional problems arising from the matrix of contract, tort and property law. In this context too we must draw attention here to the following. The expression "interference" is not a legal term of art. It is borrowed from the natural sciences and signifies the phenomenon of two objects that come together and have mutual influence on each other. This phenomenon exists similarly in the context of law. That is because contract law, the law of tort and property law likewise have mutual influence, the one impacting on the other. Such interferences strictly understood are met with, it must be emphasised, solely *within one and the same legal system*. The contract law of country A never impacts on the law of tort of country B and vice versa. The same goes for the other areas within private law. It is the case, likewise, that the property law of

<sup>52</sup> *Beale*, Finding the Remaining Traps Instead of Unifying Contract Law, in: Grundmann/Stuyck, An Academic Green Paper on European Contract Law (2002) 67-72.

<sup>53</sup> For a first law and economics analysis with evaluation of responses from business circles to the Communication of the Commission (fn. 3) see however *Ott/Schäfer*, Die Vereinheitlichung des europäischen Vertragsrechts. Ökonomische Notwendigkeit oder akademisches Interesse?, in: *Ott/Schäfer* (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002) 203-236.

<sup>54</sup> *v. Bar* (head of team)/*Barendrecht/Basedow/Drobnig/van Gerven/Hondius/Kerameus/Koussoulis/Lando/Loos/Tilmann*, The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code, European Parliament, Directorate General for Research, Working Paper, Legal Affairs Series JURI 103 EN (1999) and *v. Bar/Lando/Swann* loc. cit. (fn. 5 above).

country A does not have a direct impact on the contract law of country B, nor does the property law of country B have direct impact on the contract law of country A. It follows that the phenomenon of interference only has any cross border relevance when looked at from the standpoint of complexity: in the difficult field of an overlap or intersection of questions from different areas of law there exists a significantly serious danger of a lack of information with respect to the law of another country. One may put this in another way: correct information is particularly difficult to ascertain and consequently expensive and a deterrent. The required advice can no longer just relate to a foreign contract law; it must extend beyond that to the corresponding foreign law of tort and property. Apart from this complexity problem (as to whose relevance for the internal market in a wider context attention has already been drawn by the European Council in Tampere (see above at section 2)), the problem of interference, defined narrowly, is only relevant, if considered in connection with a reflection on the creation of a system of private law for Europe. Such a legal system, no different from any other, will have to engage in depth with such overlaps and interconnections. That in turn can only take place against the background of the experiences obtained in the national legal systems of the EU. This study, accordingly, puts a high value on setting out a comparative law treatment of the current position, within which one must necessarily go into rules of law that have no immediate connection with the question of impediments to the internal market.

**30. A broader understanding of the term “interference”** It is clear from the Commission’s formulation of the issue that it wishes to be informed with respect to the problem of interference analysed from a still wider perspective. The concept of interference is also used by the Commission in an extensive sense. It addresses the additional problem whether for an exporter of goods and/or services impediments could arise from the fact that the law of delict or the law of property of the country of import differs from that of the exporter’s own country. That is a question directed towards the manner in which the internal market currently operates in practice. It is conceived functionally and is not oriented towards specific legal categories. That is because impediments to the internal market appear where distinct legal rules result in cross border economic activity being impeded or made more difficult. Such differences of law can only have their cause in the following: either the law of tort, contract or property differ from one another or a specific legal question in country A is characterised, for instance, as contractual, while in country B, by contrast, it is characterised as within tort law *and* the contract or tort law that are involved, differ in their content from each other. This study centres on the problems that are triggered by this second alternative. Since, however, it is apparent that its connection with the problems of impediments to the internal market is often one that is rather coincidental – different characterisations of exactly the same legal question can just as equally lead to the same outcome as to a difference in the outcome (compare the examples given above at section 23 and below at section 64) – this study on occasions goes beyond the treatment of the core themes that it tackles. It also addresses situations in which cross border activities generate problems due to the fact that the country where goods are to be delivered or services performed characterises a given question of law differently from the way that it is characterised in the country from where the goods are sent from or where the services originate. It deals also, indeed, with situations where the legal systems involved characterise the legal question identically, but come to a different

outcome on the matter in question. This theme however, is such a broad one considering the instances it can cover that it can only be examined here by consideration of particular examples. An exhaustive treatment of this theme would have required a research project of many years duration.

### III. Methods and Authorship of this Study

31. **Procurement of the legal data** In order to do justice to the commission for this study, we have brought together the results of foundational legal scholarship, extended them, and supplemented them with details of law in practice. The data in this study on the legal situation in the member states of the European Union are based on the sources indicated in each case. For parts of this study we could rely on results of existing research. Among these are the extensive comparative legal data in the 'Notes' of the Principles of European Contract Law (of the authors of this study *v. Bar*, *Castronovo* and *Drobnig* are or were members of the Commission on European Contract Law), some research results from the Trento led 'Common Core-Project' (in which *Bussani* participates), the results of the continuing seminars on common European tort law<sup>55</sup> led by *v. Bar*, as well as the (yet to be published) interim results of the Working Teams of the Study Group on a European Civil Code in Hamburg (team-leader *Drobnig*), Osnabrück (team-leader *v. Bar*), and Salzburg (team-leaders *Lurger* and *Rainer*). The Hamburg Working Team is concerned with the law of personal credit securities and credit securities in movable property, the Osnabrück Working Team with tort law, unjustified enrichment law, and the law of benevolent intervention in another's affairs (*negotiorum gestio*), and the Salzburg Working Team with the transfer of ownership of movable property.

32. **The team of authors** The authors of this study work in different universities within Europe. The general editing rested with *v. Bar*, who also had the general responsibility for the contract/tort section, as well as composing the introduction. *Blackie* and *Castronovo* placed examinations of the interference problem in the relationship between contract and tort (within the United Kingdom and in Italian law, respectively) at the disposal of the coordinator of this study. The coordinator integrated these contributions into the individual sections of the study. *Alpa* compiled the section on liability for incorrect information. In this part of the study *Alessandro Saccomani*, *Walter Riedweg* and *Filippo Rossi* participated. *Bussani* is the author of the section on 'Pure Economic Loss', *Hagström* the author and coordinator of the section on 'Interference with Contractual Rights'.

33. *Drobnig* is responsible for the part on property/contract law. Within this part, Professor *Rainer* (Salzburg) was in charge of the section on transfer of title in movables especially with the assistance of Dr. *Jakob Stagl* (Salzburg) and *Drobnig*. Professor *Gambaro* (Milano) wrote the section on security in immovables. He relied on written information furnished by, and clarified and amplified in a symposium held in Trento with, Professors *Ph. Delebecque* (Paris), *Dirix* (Leuven), *Graf* (Salzburg), *G. Gretton*

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<sup>55</sup> Published in *v. Bar*, *The Common European Law of Torts* (2 vols., 1998 and 2000).

(Edinburgh), B. Iversen (Odense), Y. Karibali-Tisptsiou (Athens), R. Paisley (Aberdeen), E. Roca y Trias (Barcelona), Dr. J. Rutgers (Amsterdam), E. Tammi-Salminen (Turku), C. van der Merwe (Aberdeen), Dr. Wolfsteiner (Munich) and Odd Swarting (Stockholm). Dr. Swann (Osnabrück) is the author of the section on trust law. For the section on security in movables, *Drobnig* received national reports and comments from Dr. G. Affaki (Paris) and Professors M. Bridge (London), A. Carrasco (Toledo), T. Håstad (Stockholm), M. Lukas (Linz), H.J. Snijders (Leiden), and A. Veneziano (Rome). The author of the section about electronic communication is *Ramberg*; the author of the section on the effect of contracts on third parties is *Wintgen*, who wrote it in consultation with Professor *Ghestin* as well as Professors *Viney* and *Billiau* (all at Paris I).

34. The following researchers from the Hamburg Working Team of the Study Group on a European Civil Code participated in the study: *Christopher Bisping* (England), *Judith Hauck* (France), *Almudena de la Mata* (Spain and Italy) and *Dr. Malene Stein Poulsen* (Scandinavian countries).

35. The following researchers from the Osnabrück Working Team of the Study Group on a European Civil Code participated in the study: *Begoña Alfonso de la Riva* (Spanish Law), *Erwin Beysen* (Belgian, Luxembourgian and French Law), *Dr. Evlalia Eleftheriadou* (Greek Law), *Andreas Fötschl* (Austrian Law), *Caterina Gozzi* (Italian Law), *Dr. Matthias Hünert* (German Law), *Rosalie Koolhoven* (Dutch Law), *José Carlos de Medeiros Nóbrega* (Portuguese Law), *Sandra Rohlfing* (Private International Law), and *Johan Sandstedt* (Nordic Laws). *Ina El Kobbia* was responsible for the organisation and evaluation of the empirical information. Translation of *von Bar's* German composition, as well as minor editorial work for the whole study, was undertaken by *Stephen Love* and *Daniel Smith* with assistance from *Swann*.

36. **Procurement of the empirical information** In order to obtain the information desired by the European Commission regarding obstacles to the proper functioning of the internal market or possible distortions of competition, we dispatched letters to international and European associations and various national trade-specific business associations, chambers of industry and commerce, guilds, selected economic enterprises, as well as law societies and firms engaged in giving legal advice. Further letters were likewise addressed to consumer organisations based in various member states of the EU. Two rounds of questionnaires were carried out. A first general set of questions was posed with the commencement of the work on the study. The text of these letters is set out and the answers are summarised in Part Four. Some 650 letters were sent by post, of which some 32 addressees in Austria, 51 in the Benelux States, 38 in France, 168 in Germany, 60 in Greece, 17 in Ireland, 53 in Italy, 47 in Portugal, 41 in the Scandinavian countries, 39 in Spain and 86 in the United Kingdom. A further 15 letters were sent to international and European associations. Additionally further letters were sent by electronic mail in order to facilitate a wider circulation. In that regard some 30 letters were sent directly by electronic mail for further distribution. The different number of addressees in the various member states is explained by different national traditions in forming associations; the different patterns in import and export activities play a further role. The English version of the text printed in Part Four of this study was translated by us

into German, French, Greek, Italian, Portuguese and Spanish. (We have refrained from reproducing these translations in this report.) The response rate was about 10% of letters dispatched. However, the answers were often preceded by extensive questioning of the members of the federations addressed. Thus one individual answer often stands for numerous confirmatory statements. In order to verify the results established by our scientific work, we organised a second round of questionnaires with more specific questions and illustrated by examples. This second questionnaire was sent (by electronic mail) to those representative bodies that had responded to our first questionnaire and to further selected addressees by post. Its text is set out in Part Four of this study as well. However, the responses to this second questionnaire (which we dispatched in English, French and German) are integrated directly into the text of the study. We dispatched in total (i. e. by electronic mail and by post) some 300 letters to addressees in all EU Member States. (It is beyond our knowledge how often our electronic version was forwarded to others by the organisations addressed by us, though we do know and – are grateful that – this took place.) The response rate was about 6%. *Gambaro* organised a conference with experts on the law of credit securities in Trento on the 17th and 18th July 2003 and integrated the results of this conference into his contribution to the study.



## Part One: Non-contractual Liability and Contract Law

### I. Overview of National Approaches to Non-contractual Liability Law

#### (1.) General

37. The concept of “non-contractual liability law” The instructions for this study do not make clear what exactly is to be understood by the term (or the categorisation) “non-contractual liability law”. In the following we assume that non-contractual liability covers the area of law which in Germany is mostly called *Deliktsrecht* (or the law of *unerlaubten Handlungen*), in France bears the title *responsabilité civile délictuelle* and in the Common Law passes under the rubric of ‘the law of torts’ or ‘tort law’. We further assume that the term “non-contractual liability” also embraces the field of “fault-based” liability (as it is still called in many continental legal systems) as well as “strict” liability. Our understanding is that this study is not to be pursued in such a way that it covers the remaining extra-contractual obligations (in particular the law of unjustified enrichment [in the broad sense, that is to say including *condictio indebiti*] and the law of benevolent intervention in another’s affairs [*negotiorum gestio*]), although it may also be patently apparent that there are at least as many issues arising from their interaction with matters regulated by contract law as there are in the relation of the latter to tort and property law.<sup>1</sup> In accordance with the instructions for this study, the interrelationships both between those areas and between those areas and contract, property and tort law, are outside our remit. Moreover, equally beyond the scope of this study is a completion of the “triangle” of interrelationships, in the sense of illuminating the often extraordinarily entangled connections between tort and property law. (These appear, for example in the functional equivalence of *rei vindicatio* and the tort of conversion, and also in a number of further intersections – amongst others in the field of the so-called owner/possessor relationship and the acquisition of property in good faith from an unentitled party.) In other words, this study will by no means address all questions which result from the interaction of contract law with neighbouring areas of law.

38. Definition and purpose of the law of tort (or delict) In all the legal systems of the European Union, the law of tort (or delict) is the area of the law in which it is decided whether one who has suffered damage can on that account demand reparation from another with whom there may be no other connection in law than the incident of damage itself. That distinguishes the law of tort from all other systems of compensation

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<sup>1</sup> The Study Group on a European Civil Code naturally gave this circumstance consideration and is therefore also drafting “Principles” on the law of “Benevolent Intervention in Another’s Affairs” and “Principles of European Unjustified Enrichment Law”.

for damage – in particular therefore that of the law of contract and those compensation schemes which are organised on the basis of insurance law. In distinction to the latter, moreover, the law of tort guarantees to the victim only that there is someone who is liable and not, by contrast, that he is also able to satisfy his obligation. The purpose of the law of tort consists in protecting basic human rights at the level of private law, that is to say horizontally between citizens *inter se*, with the legal remedies placed at their mutual availability. From its content, tort law forms the second auxiliary pillar (next to contract law) on which the so-called law of obligations is based. Contract law is the basis for the increase of a party's patrimony by receipt of money, goods or services, whereas tort law protects persons and the preservation of their patrimony. Both of these fields of law would be senseless without the other.

## (2.) Differences in External Representation

39. **Liability based on intention or negligence** However, the existing national laws of tort in the European Union<sup>2</sup> differ substantially in their taxonomy and structure. This relates to both of the parts from which the law in this area is primarily constructed. The two strands are, on the one hand, liability for a deviation from the required standard of behaviour, i. e. liability for wrongs committed intentionally or negligently, and, on the other hand, all those forms of liability according to which the defendant is accountable for a given damage although the individual concerned (or, as the case may be, a legal person) has behaved perfectly correct. The most important differences when determining the relationship between tort and contract law appear, however, in the context of liability for negligence. In the areas of liability for intentional causation of damage and strict liability they are generally of less importance.

40. **England and Wales, Ireland, Continental Europe, Scandinavia** Leaving the details to one side, it is possible to distinguish between at least three groups of jurisdictions in regard to the construction of the law of liability for breach of duty. At one end of the spectrum there is the English and Irish Common Law with its system of individual torts, which resembles the way continental European systems set out their penal laws. There are roughly 70 to 75 torts.<sup>3</sup> However, those which really matter in day to day practice are rather limited in number: trespass, negligence, breach of statutory duty, nuisance, and defamation. Among these, negligence is the most important. In addition, one finds many statutory regulations, normally with a very small field of application. It is probably fair to say that no European jurisdiction has as many tort law statutes as English law. All other European systems have their starting point in one (sometimes subdivided) basic tort law provision. This is true not only for continental Europe's codifications but also for the

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<sup>2</sup> In view of the autonomy of Scottish law, there are at least 16 jurisdictions involved, though even this overlooks the (conceptually, albeit in practice much more rarely tangibly) distinct law within the United Kingdom of Northern Ireland. To be exact, one would also have to add the special regional regimes – in Spain in particular and other member states in general.

<sup>3</sup> Rudden, *Tortious, Tul.Civ.Law Forum* 6/7 (1991-92) 105-129.

three Scandinavian tort law systems as well. The latter refer to this basic provision as the “culpa-rule”, be it part of their common law (as in Denmark) or expressly stated in a statute on the compensation of damage (as in Sweden and Finland).

**41. Systems relying on broad principles** On closer inspection, however, one finds that these basic tort law provisions differ in many respects. It has become customary to place in one category those systems which do no more than rely on the general principle that everybody who, through his fault, causes damage to another must make good the damage (Arts. 1382 and 1383 of the French, Belgian and Luxembourgian Civil Codes). Art. 1902 of the Spanish Civil Code is in very similar terms, the only difference being that its wording was deliberately drafted so as to cover the tortious liability of legal persons as well. Whether or not one can say that Greece and Italy also rely on a “general clause” is probably open to debate. Art. 914 of the Greek Civil Code provides for what in German legal terminology is called a “blanket provision”. Taken literally art. 914 of the Greek CC contains no more than the tort of breach of statutory duty. A cause of action in tort requires that the defendant’s behaviour was “*para ton nomon*”, against the – or a – law. However, ever since Greek courts decided that statutory provisions like the one on “good faith and fair dealing” amount to “statutes” within the meaning of art. 914 CC<sup>4</sup> the conclusion seems inevitable that Greece, too, has been moving towards a “general clause”. The situation is rather similar in Italy. Art. 2043 of the Italian CC differs from its French model only in so far as it expressly requires an “unjust damage”, a *danno ingiusto*. Originally this term was interpreted in a way very much along the lines of the German § 823 (1) BGB, but since then the Italian courts have changed tack in many important respects – so much that the present Italian law of torts, *danno biologico* apart perhaps, is much more in the European main stream than the German.<sup>5</sup>

**42. Systems relying on a list of protected interests** At least on the face of things, countries like Portugal, Austria and Germany must be put into another category. The approach of their basic provisions is much narrower, the narrowest being art. 483 (1) of the Portuguese Civil Code. It has the infringement of an absolute right and the breach of statutory duty as fundamental causes of action. There is nothing more. Even the subsidiary tort of causing damage intentionally and in breach of *bonos mores* (good morals) – recognised (albeit with differences in wording) in Austria, Germany, the Netherlands, Greece, and Finland – is missing in the Code (though Portuguese law has techniques to fill this gap). Austria, too, relies on a list of protected interests. Although § 1295 (1) ABGB recognises no such list of “absolute rights” (the wording of this provision amounts to a classical general clause) the Austrian courts interpret it very much along the lines of the wording of the German Civil Code.<sup>6</sup> The German BGB splits its basic tort law provision into three separate headings. There are three fundamental causes of action: the infringement of an “absolute” right, breach of statutory duty and

<sup>4</sup> For references see *v. Bar*, *The Common European Law of Torts*, vol. 1 (1998), para. 19.

<sup>5</sup> For an overview of these developments see *Castronovo*, *La nuova responsabilità civile* (1997), 3-32.

<sup>6</sup> See Schwimann (*-Harrer*), *ABGB VII*<sup>2</sup> (1997), § 1293 no. 2.

breach of *bonos mores* accompanied by the intention to cause damage (§§ 823 I, II and 826 BGB).

43. **The Netherlands** Finally, art. 6:162 of the Dutch BW reads (in the translation by Mackaay and Haanappel 1999):

- (1) A person who commits an unlawful act against another which is attributable to him, must repair the damage suffered by the other as a consequence thereof.
- (2) Except where there are grounds for justification, the following acts are deemed unlawful: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.
- (3) A wrongdoer is responsible for the commission of an unlawful act if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.

The Dutch solution thus contains a compromise between the German and the French model. Dutch tort law operates (as the German does) with the infringement of a right and the breach of statutory duty as distinct causes of action. The “rights”, however, are not enumerated and need not be “absolute” in character. Furthermore the third alternative of art. 6:162 sec 2 BW is sufficiently flexible to cover all other situations. Unlike the equivalent Austrian, German and Greek provisions on liability for breach of *bonos mores*, it does not require an intention to cause damage (sec. 3 loc.cit.).

44. **Summary** The findings of comparative law show many substantial differences in approach to the structure of the law of tort or delict. However, they also show that most of the tort law systems work with a basic norm, out of which all the essential elements at least of the so-called liability for “fault” arise. This applies too, albeit with limitations, to the Common Law, where the tort of negligence undertakes a very similar function. It is now quite some time since its range of application ceased to be limited to liability for bodily harm and damage to property only, and it is obvious that where there is liability for negligence there must inevitably be liability for intentional causation of damage.

### (3.) Pure Economic Loss

45. **Differences in approach** From the point of view of the interference problem which is at the fore of this study, one of the most important substantial points in these various ways of drafting is the compensation for pure economic loss. The German Civil Code deliberately excluded pure economic interests from the protection afforded by § 823 (1) BGB; they are recoverable only under §§ 823 (2), 824 and 826 BGB. Whereas German and English law remained relatively close to each other – even after *Hedley Byrne v Heller*<sup>7</sup> (which broadened the scope of negligence in English law so as to allow for the recoverability of pure economic loss under certain well defined conditions), a rather dramatic gap developed between France and Germany. Art. 6:162 of the Dutch Civil

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<sup>7</sup> *Hedley Byrne & Co. Ltd. v Heller and Partners* [1964] A.C. 465 (HL).

Code of 1992 has tried to bridge this gap, as has art. 2043 of the Italian CC. Swedish and Finnish Law have special provisions on the recoverability of pure economic loss, the main rule being that a cause of action in this field requires criminal behaviour (chap. 2 § 2 Swedish law on compensation for damage, chap. 5 § 1 line 2 Finnish law on compensation for damage).<sup>8</sup> This rule is not exclusive, however.<sup>9</sup> The law of liability for pure economic loss is of great importance for the questions posed in this study not just because differences in outcomes in this area arise in the assessment of economically relevant legal problems, but also because it supplies a particularly vivid example of the overlap of contractual and non-contractual liability. Somewhat simply put, one tends to find a narrow tort law system combined with a wide contract law system, and *vice versa*. From a pan-European perspective, a helping hand is urgently needed to establish a sense of order.

**46. Different notions of pure economic loss** Moreover, present day Europe does not even share a common notion of what constitutes “pure economic loss”. In the *De Chirico* case the Italian Corte di Cassazione developed a “right” to the integrity of one’s economic assets (or patrimony),<sup>10</sup> case law to which the Corte di Cassazione has continually adhered<sup>11</sup> despite criticism in the literature.<sup>12</sup> (A recent example concerns the case of an employee who embezzled money from his employer. This involved both liability arising under contract law and liability in tort, namely the infringement of the property right of the employer.)<sup>13</sup> English, Irish, Scottish, Swedish and Finnish lawyers would define “pure economic loss” as any loss not occurring consequent to damage to the physical integrity of a person or a tangible thing. A German, Austrian, Portuguese and (probably) a Dutch<sup>14</sup> lawyer, for their part, would describe “pure economic loss” as any

<sup>8</sup> For further references see *v. Bar*, *The Common European Law of Torts*, vol. 1, para. 243-248 and 303. In Swedish tort law, pure and general economic losses are fundamentally differentiated as well as damage to third parties. Pure economic loss arises where there is no connection to personal injury or property damage (chap. 1 § 2 Liability Act). General economic loss arises through someone suffering personal injury or property damage. Damage to third parties, however, is in principle only due compensation if there is an express statutory provision (for example, the claim of dependant close relatives due to the death of a breadwinner (chap. 5 § 2 no. 2 Liability Act).

<sup>9</sup> See in more detail *Kleineman*, *Ren förmögenhetsskada. Särskilt vid vilseledande an annan än kontraktspart* (Stockholm 1987). Finnish Liability Act refers to crimes and damage caused by unlawful conduct in “particularly serious circumstances” for the basis of a claim for the compensation of pure economic loss. For recent developments in Swedish case law see further *Kleineman*, *Om den befogade tillitens skadeståndsrättsliga relevans*, JT 2001/2002 p. 625 ff.

<sup>10</sup> Cass. 4. 5. 1982, n. 2765, *Foro it* 1982, I, 2864 = *Giust.civ.* 1982, I, 1745 (note *di Majo*).

<sup>11</sup> See for example Cass. 25. 7. 1986, n. 4755, *RGiur.it.* 1986, voce *Concorrenza e pubblicità* n. 71; but for a different view in an *obiter dictum* see Cass.sez.lav. 16th May 2000, n. 6356, *Giust.civ.Mass.* 1038.

<sup>12</sup> *Castronovo*, *La nuova responsabilità civile*, cit., 92.

<sup>13</sup> Cass.sez.lav. 16th May 2000, n. 6356, *Giust.civ. Mass.* 1038.

<sup>14</sup> Examples for pure economic loss are amongst others (after Asser/*Hartkamp* III<sup>10</sup> (1998) no. 47) losses consequential upon unfair competition (e.g. pointing out deficiencies in someone’s commercial products, while promoting ones own products of the same type (H.R. 22

loss not consequential to the infringement of a right, thus excluding many losses from the notion of pure economic loss which in other countries would be seen as typical examples for this category. An average French, Belgian, Luxembourgian or Spanish lawyer, in turn, will most probably not even understand the concept: *a dommage purement économique* is a category completely alien to him.<sup>15</sup> One and the same problem can thus appear under completely different headings. In order to improve the situation German law has developed a vast variety of escape devices under an astoundingly far reaching contract law, whereas the Common Law, hampered by the doctrine of consideration, deals with exactly the same situations (and achieves very similar results) within the negligence-based concept of breach of duty or voluntary assumption of liability, the latter amounting under German law to a contractual duty to take reasonable care.<sup>16</sup> French law, on the other hand, limits its liability for “pure economic loss” whenever it thinks necessary to do so by applying the notion of causation in a rather restrictive way. It is highly likely that significant costs in the obtaining of information do arise from this complex legal position, as one involving interaction between the systems of law. It is the case that anyone seeking to be informed about these areas that border on each other can only be sure he has obtained accurate guidance if he has carried out research simultaneously into two different areas of law. At the same time he has to be made aware that different characterisations of the exact same legal question in a particular case can lead to identical or virtually identical results. For instance someone who obtains from a customer’s bank an inappropriately favourable report with respect to that customer’s creditworthiness may have in English law a claim in tort for compensation for his resulting loss when the customer does not pay. By contrast, in German law the claim is one in contract law. However, the result in practice, apart from some peripheral issues such as prescription/limitation, is the same whichever of these solutions applies.

In our second questionnaire we have again explicitly pointed to this problem of complexity. The responses received confirm that it necessitates thorough research into foreign contract law *and* tort law and that as a result particular information costs arise. Those professionally engaged in providing legal advice indicate, however, that the high information costs often induce their clients to forego comprehensive advice on contract and tort law. However, from the insurance sector we are informed that for precautionary

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November 1934, NJ 1935, p. 529), losses consequential to abuse of a monopoly (H.R. 22 June 1973, NJ 1973, 386) and losses consequential to endangering another’s creditworthiness (H.R. 9 May 1986, NJ 1986 no. 792).

<sup>15</sup> In one of the leading works on French tort law the term *préjudice purement économique* has been inserted (*Viney and Jourdain*, *Les conditions de la responsabilité*<sup>2</sup>, nos. 250 ff. pp. 19 ff), but a meaning is attached to it which is different in comparison with most of the other European jurisdictions. It appears mainly as an overarching term for the *atteintes au seul patrimoine* and the *conséquences économiques des atteintes à l’intégrité physique de la personne*. The *préjudices purement économiques* understood in this way are compared with the *atteintes aux intérêts non exclusivement économiques*, to which the different *dommages moraux* belong.

<sup>16</sup> See further, offering detailed support from German and English case law, *v. Bar*, *Liability for information and opinions causing pure economic loss to third parties: a comparison of English and German case law*, in: Markesinis (ed.), *The Gradual Convergence. Foreign Ideas, foreign Influences and English Law on the Eve of the 21st Century* (Oxford 1994) p. 98-127.

reasons they regularly look at the entire foreign legal system. From our first questionnaire, moreover, we know that industrial and commercial bodies consider that in taking out insurance they are able to forego a general analysis of foreign liability law, leastways so far as the business is not of special importance (see below Part V).

#### (4.) Protection Afforded to Intangible Rights of personality

47. **Common Law** Not insignificant differences, which may also have as their cause the different manner in which tort law is depicted, exist in the area of incorporeal rights of personality. In particular English Common Law<sup>17</sup> has so far not yet definitely decided to acknowledge a distinct tort of infringement of privacy.<sup>18</sup> At present it seems that the traditional torts are being maintained, in particular breach of confidence and nuisance. Next to these exist libel and slander as grounds for legal action, and also the legal claims established by section 3 of the Protection from Harassment Act 1997 as well as by section 13 of the Data Protection Act 1998. The summation of these grounds for legal action often do not reach the continental European standard of protection and this can have repercussions for the internal market, in particular in the marketing of cross-border press material.

An example is supplied by the (as yet unpublished) decision of the Hamburg *Landgericht* from January 2003 in a case between the German Federal Chancellor and the publishers of an English newspaper, the "Mail on Sunday". The subject matter of the dispute were publications (the truth of which was disputed) in the English press concerning the private life of the claimant. The court prohibited the English publishers from publishing the statements in Germany.<sup>19</sup> Other English daily newspapers refrained from similar publication in the internet as well as in print, one of the reasons being that these pages would be accessible in Germany. A

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<sup>17</sup> Irish law appears to be more amenable to development in this area than the English, for reasons of constitutional law, but it nonetheless remains very close to English law. See further *v. Bar*, The Common European Law of Torts I, para. 298.

<sup>18</sup> The legal situation appears at the moment to be anything but clear in the face of a string of decisions by the Court of Appeal, which by way of *obiter dicta* discuss to diverse effect the existence of a right to privacy: see on the one hand *Douglas v Hello! Ltd* [2001] 2 W.L.R. 992 and on the other hand *A v. B plc* [2002] 3 W.L.R. 542, 551 (Woolf CJ); *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] 3 W.L.R. 405 as well as *Campbell v MGN Ltd.* [2002] EWCA Civ 1373, [2003] 1 All ER 224, 240 (para. 70, Lord Phillips MR: "The development of the law of confidentiality since the Human Rights Act 1998 came into force has seen information described as 'confidential' not where it has been confided by one person to another, but where it relates to an aspect of an individual's private life which he does not choose to make public. We consider that the unjustifiable publication of such information would better be described as breach of privacy rather than breach of confidence").

<sup>19</sup> For the private international law and private international procedural law background of such press law litigation see ECJ 7 March 1995, *Shevill v Presse Alliance SA*, C-68/93, ECR1995, I, 415.

British radio programme raised the issue of harmonisation of Europe's privacy laws.<sup>20</sup> The case shows that different standards in protecting the rights of personality of a prominent person not only hinder the export of newspapers, but that they also provide a competitive advantage. Readers could only read the story in the English printed copy of the newspaper, something which will have affected the choice of the consumer in purchasing a newspaper at the newsstand or in the airport.

48. **Contract law** Infringements of what in some legal systems is termed the general right of personality (human dignity) as a result of a breach of contract tend to occur rather rarely. One thinks, for example, of the use of advertising material (such as pictures) for products other than those agreed upon, of journalists who publish more personal details about a person interviewed for a fee than were agreed, or of self-employed persons who breach their duty of professional secrecy. In addition, it would also be conceivable to analyse the liability of doctors and hospitals for insufficient explanation to patients before a *lege artis* operation from the perspective of the protection of rights of personality. Independent of this, however, the question remains which subject matter within the domain of protection of rights of personality belong to contract law and which to tort law. This can be resolved quite variously in the different legal systems of the member states.

A vivid example is provided by the case from the French Cour de Cassation. In a supermarket an anti-theft security system which was not functioning correctly was set off. This generated the (groundless) suspicion that the plaintiff had been shoplifting. The supermarket operator was not found to have been at fault. The Cour de Cassation held that liability as *gardien* under art. 1384 (1) CC was exclusively applicable, rejected any contention there was an infringement of the principle of *non-cumul des responsabilités* and ruled that compensation be paid for the *dommage moral* suffered.<sup>21</sup> In German law compensation for the moral injury would not be possible either under contract law (the case could probably be interpreted as involving a breach of contract, but the supermarket could exculpate itself on the matter of fault [§ 280 BGB], and in any case it would not be contractually liable for moral damage because of § 253 (2) BGB) or tort law (which remains applicable, but fault is a prerequisite).

49. **Non-contractual liability law** The main focus of the protection of human dignity, from a private law point of view, runs all through non-contractual liability law.

50. **Greece, Spain, France** Special legislation is dedicated to the protection of incorporeal patrimonial rights, which for their part often contain regulations for the compensation of non-material damage: see for Greece Act no. 1178/1981 on Civil Liability of the

<sup>20</sup> Details on the case and its outcome were reported in the following internet addresses: <http://news.bbc.co.uk/2/hi/europe/2681463.stm>, <http://news.bbc.co.uk/2/hi/europe/2677513.stm> and <http://www.welt.de/data/2003/01/19/34396.html?prx=1>.

<sup>21</sup> Cass.civ. 5. 6. 1991, D 1992 Jur. 409, with note by *Lapoyade Deschamps*.

Press and for Spain in particular the *Ley Orgánica 1/1982, de 5 de Mayo, de Protección Civil del Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen*<sup>22</sup> (Constitutional Law 1/82 of 5th May 1982 on civil protection of the rights to honour, to private life and to one's own image). Within the codifications there are rules about the protection of the private sphere in art. 9 of the French CC, and rules on particular aspects of the protection of human dignity in art. 57 of the Greek CC.

**51. Portugal, Germany, Austria** In the Portuguese Civil Code the rules about the protection of particular rights of personality are especially numerous (arts. 70 to 81 Portuguese CC). They are located in the general part of the Civil Code. Art. 70 (1) CC concerns the general protection of rights of personality and reads: "The law protects all persons against every unlawful injury or impending injury to their body or mind." Further rules concern the protection of posthumous rights of personality (art. 71), the right to one's own name (arts. 72 and 73), the right to a pseudonym (art. 74), confidential letters (arts. 75 and 76), family memoirs and other confidential writings (art. 77), non-confidential letters (art. 78), the right of one's own image (art. 79), the right to the protection of the intimacy of private life (art. 80) and the voluntary limitation of rights of personality (art. 81). In Germany the protection of the so-called general right of personality has been carried out solely on the basis of the case law which in this respect is directly based on the rules of the constitution on the protection of human dignity (Art. 1 Grundgesetz) and the right of the free development of personality (Art. 2 (1) Grundgesetz).<sup>23</sup> For Austria, reference is to be had to § 16 of the ABGB. This provision encompasses amongst other things the general right of personality to respect of privacy and the rights to bodily integrity, to honour, to safeguarding of economic reputation, to one's own image, to respect for secrecy, not to be disturbed by unwanted telephone calls or to be subject to audio and visual recordings, and to posthumous protection of personality.<sup>24</sup>

**52. Italy** In Italy the so-called pluralistic approach (according to which there are different independent rights of personality), has been widely held to date. However, an increasingly advocated opinion is that a uniform view of rights of personality (*diritti della personalità*) is necessary.<sup>25</sup> The proposition is derived from the provisions of the first

<sup>22</sup> BOE Nr. 115 of 14th May 1982.

<sup>23</sup> See amongst others BGH 25th May 1954, BGHZ 13, 334, 338; BGH 2nd April 1957, BGHZ 24, 72, 76 f.; BGH 20th March 1968, BGHZ 50, 133, 143; BGH 5th December 1995, NJW 1996, 984; BGH 1st December 1999, NJW 2000, 2195, 2197.

<sup>24</sup> See on § 16 ABGB in particular OGH 27th February 1990, SZ 63/32 ("§ 16 ABGB is [...] a central rule of our legal system with a normative content guaranteeing subjective rights. It acknowledges the personality as a basic worth. In its core § 16 ABGB protects the human dignity") and OGH 18th December 1992, SZ 65/166 (the general value judgements of the constitutionally guaranteed fundamental rights flow into the private law via § 16).

<sup>25</sup> On the "pluralistic" concept see further, for example. *De Cupis*, I diritti della personalità, in Trattato di diritto civile e commerciale già diretto da Cicu Messineo e continuato da Mengoni (1982) 38-45 and *Vercellone*, Personalità, in Nss. D.I., XII (1957) 1084. *Dogliotti*, Le persone fisiche, in Trattato di diritto privato diretto da Rescigno, 2, vol. 1, Persone e famiglia (1999) 66 ff. and *Dogliotti*, Profili di responsabilità civile nella tutela della persona, in La responsabi-

chapter of the first book of the Codice Civile that every natural person enjoys protection from the dissemination of images and intimate information.<sup>26</sup> Case law has developed the *diritto alla riservatezza*<sup>27</sup> and the *diritto all'identità personale*.<sup>28</sup> It is now not disputed that rights of personality too are protected by the tort law provision of art. 2043 CC. Problems are only caused, due to art. 2059 CC, by the question of whether incorporeal damage can be compensated (see also arts. 7 and 10 CC).<sup>29</sup> A no-fault based right to an injunction is only explicitly regulated for the protection of a name (art. 7 CC), a pseudonym (Art. 9 CC) and one's own image (art. 10 CC). In addition there are special statutes on the protection of the author and the protection of employees as well as (as in all EU member states) rights from the breach of data protection provisions, entitling compensation even for non-economic loss (art. 29 para. 9 loc.cit.), following the implementation of Directive 95/46/EC (in Italy by the *Legge* 31st December 1996, n. 675: *Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali*).

53. **The Netherlands** Rights of personality indisputably belong to the concept of "rights" within the meaning of art. 6:162 (2) Dutch BW. They include the right to physical/bodily integrity, freedom, honour, good name and privacy (personal *levens sfeer*).<sup>30</sup> These rights of personality have their foundation in human rights, protected by the constitution, from this it is taken that, depending upon the circumstances, they would be significant also for "horizontal" legal relationships between persons in a private law context. The infringement of a personality right can at the same time often constitute a breach of a duty of careful conduct imposed by law (*zorgvuldigheidsnorm*).<sup>31</sup>

## (5.) Strict Liability

54. **General** Considerable differences between the national tort legal systems are noticeable in the area of strict liability. From the point of view of interference problems, this area of law may indeed be of lesser significance than that of liability for negligence. Considered in isolation, however, it probably accounts for particularly pressing problems for the functioning of the internal market and consumer protection. In particular in the

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lita'civile -aggiornata, diretto da Alpa-Bessone, in *Giurisprudenza sistematica di diritto civile commentato*, fondata da Bigiavi (1997) vol. 1, 420, advocating, by contrast, a monistic starting point.

<sup>26</sup> *Alpa/Bessone/Carbone*, Atipicità dell'illecito, II, *Diritti della personalita' e danno morale* (1993) 1.

<sup>27</sup> Cass. 27th May 1975, n. 2129, Rep. Giur. it. 1975, voce *Persone fisiche e giuridiche* n. 23-25.

<sup>28</sup> Cass. 22nd June 1985, n. 3769, *Foro it.* 1985, I, 2211.

<sup>29</sup> It was indeed maintained that incorporeal damage was to be regarded as compensatable by a constitutionally driven analogous application of arts. 7 and 10 CC, even if (as is required by art. 2059 CC) a criminal act is missing, but that is by no means the dominant view. See in more detail and with further supporting evidence *Salvi*, *Il danno extracontrattuale*, *Modelli e funzioni* (1985) 76-79 and 238-243.

<sup>30</sup> H.R. 9th January 1987, NJ 1987 no. 928.

<sup>31</sup> See e.g. H.R. 20th March 1992, NJ 1993 no. 547; *Busshuis*.

areas of passenger transportation (accidents involving passengers), product liability (liability arising from supply chains) and liability in the context of communication (data protection; liability of internet suppliers) it has an effect on the border areas of contract and tort law.

There are significant differences for instance in the law on liability of carriers of passengers with respect to those they carry. French law in this area works with a special regime for liability. Under it the victim cannot be met with a defence of *force majeure*, nor with a defence of *fait d'autrui*. (Artt. 1 and 2 of Loi no. 85-677 of 5<sup>th</sup> July 1985). The only basis on which the carrier is freed from liability is a *faute inexcusable* on the part of the victim. Liability cannot be excluded by contract. In Germany there is no liability where there is *force majeure* (para 7 (2) StVG). In contrast to French law, a contributory fault on the part of the victim leads to a reduction in liability or, as the case may be, a complete immunity (§ 9 StVG). Exemption clauses are void in respect of death or personal injury, but only in cases of carriage for reward. In Austria liability is excluded where there is an unavoidable accident (§ 9 (1) EKHG). Contributory negligence on the part of the injured person is to be taken into account (§ 7 EKHG). In England on the other hand there is no strict liability for accidents in operating a motor vehicle (section 57 below). In French law where passengers are killed their close relatives have a claim for compensation for bereavement; but in Germany they do not and in England only in restricted circumstances is such a claim recognised. Which of these liability regimes is applicable depends on the rules of private international law, which in their turn, too, differ from one country to another. This leads to an extremely confused position in law. Generally it is the position that carriage of passengers for reward exposes the bus operator to a much higher risk of being liable under French law than under the law of other jurisdictions.

Unfortunately we received almost no responses to our question whether and to what extent such differences have repercussions for the burden of costs on business (in particular increased insurance premiums). In the few responses we received insurance costs were mostly not regarded as relevant to the determination of prices. We did, however, receive one response from a large national business confederation which expressly affirmed that insurance costs are a factor in the determination of prices. One comment indicated (without going into further details) that further steps towards harmonisation would be desirable in the field of passenger transport.

In essence three distinct groups of member state jurisdictions can be distinguished: narrow systems, which accept strict liability mostly only on the basis of special legislative provisions; broad systems, which operate with a general clause, and mixed systems which strive to combine the elements of the other two. As regards non-contractual liability law,<sup>32</sup> it must be stated that so far only the essential

<sup>32</sup> There is indeed European Community law on the law of compensation for road traffic accidents, but this does not concern the basis for liability – only questions of protection by third party insurance. See most recently Directive 2000/26/EC of the European Parliament and of the Council of 16th May 2000 on the approximation of the laws of the member states relating

aspects of responsibility for damage from defective products are harmonised across Europe.<sup>33</sup>

**55. Narrow systems** A general rule on strict liability (or *Gefährdungshaftung*) is lacking in a not inconsiderable number of legal systems. The German BGB only contains one rule on the subject (§ 833: liability of keepers of animals for so-called “luxury” animals); all other instances of strict liability are traditionally the subject of specific statutes. They are predominantly concerned with endangerment of life, body and things arising from the generation, storage and use of energy. An analogous application of the existing rules for similar cases not covered by the statute has been rejected in the case law.<sup>34</sup> The legal situation in Austria largely corresponds with that in Germany. Austria does not have a general clause for the law of strict liability either. However, case law accepts a strict liability for dangerous practices on the basis of analogy with statute.<sup>35</sup> The Greek legal system belongs to those legal systems which have special rules for strict liability.<sup>36</sup> Statutory provisions on strict liability are to be found in the CC (art. 924 [1]: keeping luxury animals) as well as in specific laws (eg. the liability of a keeper of a motor vehicle under the statute of 4/5 December 1911). In Greek academic writing, an analogous application of specific statutory provisions providing for strict liability is endorsed for cases involving sources of danger where internationally strict liability has long been the case (eg. the liability of railways).<sup>37</sup>

**56. Scandinavian Laws** The Scandinavian legal systems mirror those of Germany, Greece and Austria in terms of their basic position towards strict liability. The starting point for all of them is the so-called *culpa*-rule. In Denmark strict liability requires an express legal rule.<sup>38</sup> Swedish case law on the other hand has occasionally affirmed strict liability for given created risks even without such a statutory basis.<sup>39</sup> A recent example

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to insurance against civil liability in respect of the use of motor vehicles, amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive), OJ 2000, L 181/65 (20th July 2000). Art. 3 (Direct right of action) provides: “Each member state shall ensure that injured parties referred to in Art. 1 in accidents within the meaning of that provision enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability.”

<sup>33</sup> Namely by Council Directive 85/374/EEC of 25th July 1985 on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products, OJ 1985 L 210/29 (7th August 1985).

<sup>34</sup> RG 11th April 1935, RGZ 147, 353, 356; BGH 15th October 1979, BGHZ 54, 332, 336 f. [in as far as not superseded by BGH 18th December 1986, BGHZ 99, 249]; BGH 25th January 1971, BGHZ 55, 229, 233 f.; BGH 26th June 1972, VersR 1972, 1047, 1049.

<sup>35</sup> So for example for a shower of sparks caused by a firework OGH 28th March 1973, SZ 46/36=RS0029170.

<sup>36</sup> *Filios*, Enochiko Dikaio II (2)<sup>4</sup> (1998) 138.

<sup>37</sup> *Filios*, loc. cit. 143 ff, 146.

<sup>38</sup> *Hellner and Johansson*, Skadeståndsrätt<sup>6</sup> (2000) 178.

<sup>39</sup> The case since HD 27th June 1928, NJA 1928, 316; see in remainder *Hellner and Johansson* loc.cit.

concerns the liability for stale food.<sup>40</sup> In Sweden there is already strict liability for aircraft owners, nuclear power stations, oil pollution in the sea, railway operators and electricity installation operators. Furthermore strict liability exists in the law on traffic accidents, the Code on the environment and in product liability law.

**57. Common Law** The concept of strict liability is comparatively unique in Common Law. English law, for instance, has only a very few strict liability torts and, liability for animals, product liability and damage to the environment apart, the statutory provisions that have introduced strict liability are rather negligible. Even the liability of car owners or keepers has remained, in theory at least, based in the law of negligence. The Common Law (but not Scotland) has, of course, the so-called rule in *Rylands v. Fletcher*,<sup>41</sup> but English courts have done so much to narrow it down that other Common Law jurisdictions – Australia is an example – have given up *Rylands v. Fletcher* completely and have made it a part of negligence. The House of Lords has not gone so far, but it decided in the *Cambridge Water* case<sup>42</sup> that any liability under the rule, although strict in nature, requires foreseeability of the way the damage was finally caused by the escape of the thing from the defendant's premises. Furthermore, traditional Common Law has torts that require intention, but which remain strict in nature, i. e. do not require fault. Trespass to land is an example of this: you must intend to walk onto the land (which happens to be your neighbour's), but you do not have to know that you are crossing the boundary and thereby infringing his rights.

**58. Systems relying on broad principles** Turning to French law, the scene changes completely. Due to not much more than a historic coincidence of drafting, French courts found themselves in a position which allowed them to rely extensively (and, arguably, excessively) on a provision which was meant by its authors to be a mere introduction to the rules that followed it with no field of application in itself: namely, art. 1384 (1) CC. Today, *gardien* liability has in practice become much more important than liability for *faute*, although one should immediately add that on closer inspection it becomes very difficult indeed to find out in which respect the two differ. Liability for *faute* does not require personal fault in the sense of moral blameworthiness, whereas the liability of the *gardien* of something requires a *rôle actif* of that thing – which in turn is sometimes just another way of saying that its keeper was at fault or even to blame for what he had done or omitted to do. It should not be supposed, however, that the thing which caused the damage must have been defective. Such a requirement is demanded by Belgian law, but it has never been insisted on by the French legal system.<sup>43</sup>

<sup>40</sup> HD 3rd July 1989, NJA 1989 p. 389 (strict liability of the town central kitchen for the salmonella poisoning of a teacher). Whether and in how far this decision can be generalized, remains unknown, however (*Hellner and Johansson loc.cit.* 326).

<sup>41</sup> (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

<sup>42</sup> *Cambridge Water Co. v Eastern Countries Leather plc* [1994] 2 A.C. 264.

<sup>43</sup> *Malaurie/Aynès, Responsabilité délictuelle*<sup>11</sup> (2001) no. 191 p. 105-106: «On a pourtant essayé, dans quatre tentatives, de trouver un critère général permettant de cantonner l'art. 1384, al 1, aux choses ayant un vice interne, ou aux accidents qui sont le fait exclusif de la chose, ou aux choses dangereuses, ou enfin aux choses en mouvement. Ces tentatives ont été vaines.»

59. **Recent French case law** However, recent French case law dealing with the borderline to contract law, and therefore of direct concern to this study, sheds new light on the concept of *gardien* liability for property.<sup>44</sup>

Cass.civ. 7th May 2002 concerns a case in which a person wanting to reserve a room in a hotel fell down the stairs. The appeal court had determined that the height and width of the steps were not dangerous and that the lighting of the stairs was adequate. Neither the age of the stone stairs, nor the absence of a railing were proof that the stairs were dangerous. It was also not proven that the stairs were slippery. In the view of the *Cour de Cassation* the appeal court could permissibly conclude from these assessments that it was not proven that the stairs represented the *instrument du dommage*. Cass.civ. 9th July 2002 concerns a case in which a person fell whilst going up the stairs in a shop. It was established by the appeal court that the stairs did not have a railing, that two steps were uneven in height and that both steps were neither clearly visible nor marked with a warning. The appeal court determined that the owner of the *établissement commercial* was liable for the accident to which the abnormal way in which the shop was fitted out had contributed. The *Cour de Cassation* confirmed the decision. Cass. civ. 11th July 2002 concerns a case in which a person fell whilst walking over a sloping ramp. The court determined that the ramp was not in a bad condition, nor did it suffer from a *vice interne*. Moreover the presence of such a device in a furniture store of this sort does not represent a contravention of normal safety conditions. Finally the court determined that the object had only played a *rôle passif* in the accident. In the view of the *Cour de Cassation*, on the basis of these assessments the court was entitled to come to the conclusion that the ramp was not the *instrument du dommage* without erring in law and the legal action of the victim was rightly dismissed.

60. **Gardien liability for persons** French *gardien* liability currently consists of two “general clauses”. One is on liability for damage caused by things,<sup>45</sup> and the other, ever since the *arrêt Bliet*,<sup>46</sup> is on liability for persons under one’s *garde*. *Dorset Yacht*,<sup>47</sup> the famous English case on liability for damage caused by escaped Borstal Boys (based on the tort of negligence), would exactly fit into this second general clause on strict liability. The French *Cour de Cassation* has in the meantime even gone so far as to decide that parents are liable if the victim proves that the damage was caused by a minor who lives with and is cared for by the parents. Exculpation, by establishing an absence of fault on the part of the parents, is not possible; it is not even of significance that the fault of the minor can not be proven. The mother and father can only escape liability if a *force majeure* or *faute de la victime* can be proven.<sup>48</sup>

<sup>44</sup> All three decisions here are quoted from the case law report of *Philippe Delebecque, Patrice Jourdain and Denis Mazeaud, Responsabilité civile, D. 2003, p. 456-464.*

<sup>45</sup> Going back to Cass.civ. 16th June 1896, p. 1897, I, p. 17, note A. *Esmein*.

<sup>46</sup> Cass.ass.plén. 29th March 1991, Bull. Civ. 1991, Ass. plén., no. 1.

<sup>47</sup> *Dorset Yacht Co.Ltd. v Home Office* [1970] A.C. 1004 (HL).

<sup>48</sup> Cass.ass.plén. 13th December 2002, arrêts nos. 493 and 494, Gaz.Pal. 24th December, p. 8-9.

61. **Belgium** *Gardien* liability is a very good example of laws derived from an identical text but developing completely different solutions. The Netherlands, for instance, never accepted *gardien* liability even though art. 1403 of the old BW was nothing but a literal translation of the French text. Belgium accepted *gardien* liability, but with so many qualifications that one can hardly speak of it as the same rule of law. The thing must be defective and must suffer from a vice.<sup>49</sup> For this reason strict liability of car owners or keepers never saw the light of day.<sup>50</sup> Belgian courts never accepted the French idea of a *garde de la structure* which at least for a certain time played a role in product liability, but which today, after the implementation of the EU Product Liability Directive, is in a very difficult state of affairs in France. The Belgian Cour de Cassation recently declared that it would not follow its French sister court; Belgium does not accept a general strict liability for others.<sup>51</sup>

62. **Italy** A middle group, to which in our estimation Italian law belongs along with Spanish law, recognises strict liability both in a few special provisions of the Civil Code and also in special legislation. The Italian *Codice Civile* differentiates between liability for the behaviour of others (art. 2048 CC), liability for dangerous objects (arts. 2051, 2052, 2053 and 2054 (4) CC) and liability for dangerous activities (art. 2050 CC). The legal nature of the latter is admittedly theoretically still contested; increasingly, however, the position is urged that it is one of strict liability.<sup>52</sup> Moreover, liability under art. 2051 CC has been openly characterised by the *Corte di Cassazione* as being strict.<sup>53</sup> Art. 2054 (3) CC governs the liability of an owner of a vehicle, a usufructuary of the vehicle and a purchaser under reservation of title in respect of damage which is caused by the driver. These persons can escape liability if they can prove that the journey took place against their will. Articles 2052 and 2053 CC provide for strict liability for animals and buildings.<sup>54</sup> Liability which is connected to risks in industrial production, is often the subject of particular legislation.<sup>55</sup>

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See on this also the *rectificatif* of the Cass.ass.plén. 17th January 2003, D. 2003, 591, note *Patrice Jourdain*.

<sup>49</sup> *Walter Van Gerven*, *Verbintenissenrecht*. Boekdeel 2: *Verbintenissen uit de Wet*<sup>7</sup> (2000) 334-337.

<sup>50</sup> Belgium has, however, just introduced a far reaching system of insurance cover, which is in turn based on a system of strict liability. It results in a liability insurance cover which does not require the liability of the insured (Art. 29 *bis* de la loi du 21 novembre 1989 relative à l'assurance obligatoire de la responsabilité en matière de véhicules automoteurs).

<sup>51</sup> Cass. 19th June 1997, RW 1998-99, p. 148, note A. *Van Oevelen*; JT 1997, p. 582, *concl. J.M. Piret*.

<sup>52</sup> *Alpa*, *Trattato di diritto civile IV, La responsabilità civile* (1999) 690; *Franzoni*, *Commentario del codice civile Scialoja Branca- Libro IV, Delle obbligazioni, Dei fatti illeciti* (Arts. 2043-2059 CC) (1993) 529-533; Cass. 20 July 1993, n. 8069, *Foro it.* 1994, I, 455.

<sup>53</sup> Cass. 20th May 1998, n. 5031, *Foro it.* 1998, I, 2875.

<sup>54</sup> *Alpa/Bessone/Zeno-Zencovich*, *I fatti illeciti*, *Trattato di diritto privato diretto da Rescigno*, 14, *Obbligazioni e contratti*, VI (1999) 357, 361. On art. 2052 CC see Cass. 23rd November 1998, n. 11861, *Giur. it.* 1999, I, 1, 2048.

<sup>55</sup> *Busnelli*, in *v. Bar* (ed.), *Deliktsrecht in Europa, Italien* (1993) 22.

63. **Portugal and The Netherlands** In many respects Portuguese law resembles Italian law. Art. 483 (2) CC states expressly that “liability independent from fault only exists in cases provided for by law.” There are, however, many such cases – even within the Civil Code (arts. 499 to 510 CC). The cases regulated there are joined by many special statutory incidences of strict liability, amongst which of course product liability as provided for by Decreto-Lei No. 383/89 of 6th November 1989. Art. 6:162(3) of the Dutch BW could be read as containing a general clause on strict liability, but Dutch practice does not use it as such, at least not for the time being. The existing provisions (mainly, although not exclusively, within the Civil Code itself) seem to meet the needs of society. An innovative provision is art. 6:173 BW, according to which the keeper (*bezitter*, see art. 3:107 BW) of a movable thing “which is known to constitute a special danger for persons or things if it does not meet the standard which, in the given circumstances, may be set for such a thing, is liable when this danger materialises.” Liability for a tort committed by others and for damage caused by things is known as “*kwalitatieve aansprakelijkheid*”. If goods are used in the course of work, the professional user is liable (art. 6:181 BW). If the *bezitter* is a child, the parents are liable (6:183 (2) BW).

64. **Significance of the differences from the standpoint of the interference problem** From the point of view of the interference problem, in the foreground of this study, the enormous differences in the law of non-contractual strict liability assume significance in the same circumstances in which differences in fault-based liability have repercussions. The difficulties begin either when one and the same set of facts is capable of amounting to both a breach of contract and an event giving rise to liability in the area of non-contractual liability law, or else when it is a case where one of the areas of law fills in gaps in the other. In the first case, the relevant applicable rule on concurrence of actions between contract and tort decides the outcome of the legal dispute. In the second case, the strict non-contractual liability will normally prevail, at least when it is not a case of breach of contract. The law of passenger transportation (passenger accidents) is a fitting example of this.<sup>56</sup> However, beyond this it may turn out that the decision about which general duties a contract generates only becomes comprehensible against the background of (i) a strict legal responsibility in non-contractual liability law subsisting in parallel and (ii) the relevant rule on concurrence of actions.

Consider, for example, the simple case in which a client or patient whilst going to his lawyer or doctor, slips on an extremely slippery floor, or comes to harm when an unsafe chair collapses in the waiting room. Legal systems which recognize a non-contractual strict liability and in particular a *gardien* liability for such situations, and at the same time follow the concurrence of actions principle of *non-cumul des responsabilités*, can only achieve the desired protection of the client or patient if it is denied that the lawyer or doctor has contractual duties to ensure the safety of the

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<sup>56</sup> The “classical” differentiation between accidents involving passengers, and those involving third parties is, however, as much in traffic law as in railway accident law diminishing more and more. Often the requisites for liability are identical or aligned so much that there are only still differences for questions of agreed exemptions from liability.

room or practice. Only then is the application of strict liability in non-contractual liability law ensured.<sup>57</sup> By contrast, in legal systems in which a corresponding rule in non-contractual liability law is missing, one would naturally affirm a contractual (or, depending on the circumstances, pre-contractual) liability, especially if in this branch of liability the burden of proving fault passes to the defendant and the contractual liability does not suffer from other shortcomings such as the irrecoverability of non-economic damage.<sup>58</sup> Cases of this type demonstrate interference between contract law and the law of tort. They might easily be “enlarged”, for example, by modification of the facts to the effect that a French patient has gone to Germany to be treated or a German patient to France. At the same time the example also shows that different solutions to the problems of interference are capable of leading to identical results. There is in that case no problem for the internal market, leastways if this is appreciated in advance of business or consumer activity.

An example which clearly illustrates the second point as well as the first is provided by the “supermarket case” Cass. civ. 5th June 1991<sup>59</sup> (discussed earlier in para. 48). Under German law, in the absence of fault on the part of the defendant this case would be resolved as a matter of tort law in favour of the supermarket. In contract law the customer would only have had a chance of success if the contractual collateral duties were extended to the protection of general rights of personality. In that case not only § 278 BGB (liability for the fault of vicarious agents), but also § 280 (1), second sentence BGB (a provision admittedly difficult to interpret,<sup>60</sup> but providing for reversal of burden of proof for fault where a breach of contractual duty is established) would be applicable. It is, however, extraordinarily doubtful whether or not the general right of personality in German law also belongs to the interests protected by collateral contractual duties. The question may as yet have to be answered in the negative: case law following the coming into force of §§ 280 para. 1 line 2 (on 1. 1. 2002) and 253 (2) BGB (revised form) (on 1. 8. 2002) is lacking. In our estimation there still is no room for contractual liability for non-economic damage arising from the breach of a general right of personality, and a provision of the type set out in art. 1384 (1) French CC does not exist in German law. It is not to be supposed that in § 280 (1) (sentence 2) BGB the legislator could have been considering the breach of incorporeal rights of personality. In English law on the other hand, a case of a broadly comparable nature has been classified as purely tortious (defamation),<sup>61</sup> but liability would today probably be ruled out because of the existence of a qualified privilege. Due to the *lex loci delicti commissi* rule in the conflicts of law it should make no difference

<sup>57</sup> Cass.civ. 10th January 1990, Resp. civ. et assur. 1990, comm. no. 102; Rev. trim. dr. civ. 1990, 481 (reported by *Jourdain*), (where, however, liability was denied on the facts).

<sup>58</sup> See on this in depth *v. Bar*, The Common European Law of Torts I, paras. 460 ff.

<sup>59</sup> Cass.civ. 5th June 1991, D 1992 Jur. 409, note *Lapoyade Deschamps*.

<sup>60</sup> On this, see *Deutsch*, Die Fahrlässigkeit im neuen Schuldrecht, AcP 202 (2002) 889-911.

<sup>61</sup> To our knowledge an identical set of facts does not appear to have been decided upon in England. One could, however, deduce from *Monson v Tussaids* [1894] 1 Q.B. 671, that from an English point of view it would very likely represent a case of defamation.

from which country the consumer concerned came. If the case had taken place in Germany, German contract law would have remained applicable despite the circumstance that the consumer concerned may have had his habitual residence in France or England (art. 28 (2) in combination with art. 29 (2) EGBGB).

**65. Significance of the differences from the standpoint of the internal market** It is necessary to point out, against the general background which prompted this study,<sup>62</sup> that the differences in the area of strict liability in the member states can be of almost dramatic importance to European citizens. One only has to think of everyday incidents such as traffic accidents. Due to the different levels of protection in the national tort law systems and the related regimes of third party liability insurance, it can be of crucial importance for the whole of the rest of the victim's life and those of his relatives, in both financial and personal respects, whether the accident took place one hundred meters in front of, or beyond a given (often not even manifest) national border. Problems of this type have nothing to do with the problems of interference as such. They are a product solely of diversity between the tort law regimes involved. The problems of interference arise for consideration (and have a relevance to the internal market) only if the above cases are considered from the standpoint of a provider of goods/services. In the case mentioned about the supermarket one question is to what degree of risk of being liable to an action of recourse is the provider of the security system exposed. For the operator of a German supermarket there is no risk of this sort to be feared. This is because the operator of the supermarket is itself not liable to its customer and consequently has neither cause nor grounds to pursue an action of recourse against the manufacturer. The position for a French supermarket operator is in clear contrast: the installer of the security system incurs a clear risk of being subject to an action of recourse.

Our questionnaire did not generate any concrete responses to this problem of rights of recourse. Responses received from German addressees dealt sporadically with choice of law strategies (e. g. in favour of CISG) in order to avoid the threat of recourse, especially in view of the recent changes to the German law of obligations. Others indicated that risks of recourse only emerged in transactions involving end consumers. A consumer organisation drew attention to the Annex to Directive 93/13/EEC.

## II. The Main Differences between Contractual and Non-contractual Liability for Damage

**66. General** The following text is about the main differences between contractual and non-contractual liability for compensation of damage.<sup>63</sup> How these differences are

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<sup>62</sup> See paras. 1-17 above.

<sup>63</sup> Due to reasons of time and scope, it has not been possible to list and explore all the differences between contractual and tortious liability. Amongst the omissions we would mention as an example the so-called *mora ex re*. This means that in no small number of legal systems the debtor of a tort is "automatically" (i. e. without demand for payment) in delay (see for instance art. 1219 (2) no. 1 Italian CC). In the case of contractual non-performance, however, a demand for payment may be necessary (art. 1219 (1) CC). The partially different treatment of

resolved in the law governing concurrence of actions – whether, therefore, in the case of overlapping contractual and tortious liability the latter gives way to the former, or whether both remain applicable alongside one another (cumulative liability) – is the subject of chapter III of this part of the study. The most important differences between contractual and tortious liability relate largely to the role of fault, the question of burden of proof, the rules on the type and extent of the compensation to be made (foreseeability of the extent of the damage; compensation for non-economic damage and lost profit (compare, for example, arts. 2056 (2) and 2059 Ital. CC)), the question of recoverability of so-called “pure economic loss”,<sup>64</sup> the liability for assistants, the contractual freedom to restrict or exclude liability, and time-barred limitation of actions. Right at the forefront stands the law of monetary compensation. Indeed, contractual and tortious liability both recognize reparation *in natura* (which, however, for its part may also take the form of a monetary payment), and one could even claim that the possibility under tort law to obtain preventive legal protection<sup>65</sup> represents nothing more than an analogy to the contract law remedy of specific performance. Restitution in kind in a narrow sense (the compensation for damage using a different method than that of monetary payment),<sup>66</sup>

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frustrated expenditure, depending on whether the claim is based in contract or tort law, could only be outlined in some and not all of the legal systems. Moreover, differences between contract and tort exist in the law of set-off, because it is often only possible to offset a claim resulting from a delict in restricted circumstances.

<sup>64</sup> See on this term above paras. 46-47.

<sup>65</sup> The principles being developed within the framework of the Study Group on a European Civil Code at present read as follows:

Article 1:102: Prevention

*Where such damage is impending, this Book confers on a person who would suffer the damage a right to prevent it. This right is against a person who would be accountable for the causation of the damage if it occurred.*

Article 7:301: Prevention in General

(1) *The right to prevention exists only in so far as*

(a) *it is reasonable for the person who would be accountable for the causation of the damage to prevent it from occurring; and*

(b) *reparation would not be an adequate alternative remedy.*

(2) *Where the source of danger is an object or an animal and it is not reasonably possible for the endangered person to avoid the danger the right to prevention includes a right to have the source of danger removed.*

Article 7:302: Liability for Loss Averting Damage

*A person who has reasonably incurred expenditure or suffered other loss in order to prevent an impending damage occurring, or in order to limit the extent or severity of a damage which occurs, has a right to compensation from the person who would have been accountable for the causation of the damage.*

<sup>66</sup> The term specific restitution is for its part enigmatic. A monetary payment can also be a suitable instrument for the actual restoration of the situation which would have existed, had the damage-causing event not occurred. By restitution in kind “in the narrow sense” one means here the case in which the person responsible arranges by their own action for the necessary outcome, for example repairing the damaged object or causing it to be repaired.

however, only plays a subordinate role in practice in non-contractual liability law (even if it may theoretically be questioned from time to time whether it represents the basic rule), and the same is true for preventive legal protection. These areas are therefore put to one side in the following text.

**67. The division between contractual and tortious liability to compensate** The instructions for the completion of this study naturally assume that the division between contract and tort law is a general feature of all European legal orders. That is essentially correct, judged by contemporary legal science, but upon closer inspection it is more complicated than it at first appears. The Common Law came to organize its legal material in this way only with the abolition of the forms of action in the 19th century. The German codification operates not only with a “general part” of the whole civil law, but also with a “general law of obligations”, in which there are common rules on liability arising from contractual and tortious obligations. An entirely self-contained “contract law” is therefore not to be found. In the Austrian ABGB (and likewise in the Code Napoléon) a “general part” which regulates the common ground of individual areas of the law does not exist. Furthermore, in the area of contract law general provisions about compensation are missing. The legislation on contract law operates by way of references to<sup>67</sup> and modifications of<sup>68</sup> provisions concerning compensation law which is to be found in the 30th main part (§§ 1293 ff) of the ABGB. This is applicable to both contractual and extra-contractual claims (§ 1295 (1) ABGB) and is considered a part of “personal property law”. The ABGB has therefore not made any division between non-contractual and contractual liability. Rather it has brought the rules together in their own section. Individual rules within the law of compensation apply more particularly to non-contractual liability, others apply primarily to compensation in contractual relationships.<sup>69</sup> Such systematic peculiarities are to be kept in mind when distinctions are drawn in the following text between contract and tort law.

**68. Liability for services** The same is true in a few legal systems for the large area of liability for services. Non-contractual liability of the service industry professions has indeed remained in principle fault-based. It is centred in contract law, be it because under the relevant rules on concurrence of actions contract law takes a genuine priority of application, or because contract law is more favourable to the injured party and therefore the application of the non-contractual liability law is *de facto* superfluous (as has recently become the case in German law). In the context of the considerations employed here, it is, however, more important that some systems in the law of the liability of service providers are no longer differentiated between contractual and tortious liability at all, rather either all or at least certain services for consumers be subject to a unified and final regime of liability.

**69. Greece: liability for defective services** The most important example of the first group is found in art. 8 of the Greek law on consumer protection (law 2251/1994). With this

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<sup>67</sup> E. g. §§ 869, 874, 878, 918, 920 f., 923, 933a, 945 and 979 ABGB.

<sup>68</sup> E. g. § 945 ABGB.

<sup>69</sup> E. g. § 1299, see *Reischauer* in *Rummel-ABGB II*<sup>2</sup> (1992) § 1299 no. 6.

claim a reversal of the burden of proof has been introduced with regard to the fault in the area of liability for defective services. The interpretation of art. 8 loc. cit. is as before burdened by questions of doubt. It probably involves a double assumption. The provider of services not only has to prove that he neither deliberately nor negligently performed a defective service, but also that the performance of the service was not defective.<sup>70</sup> The liability of lawyers is structured in a quite different way. They are liable to their clients, both in contract and in tort, only for causing loss intentionally or by gross negligence.

A lawyer providing legal advice under Greek law is in a significantly more advantageous position with respect to legal liability than a lawyer in another member state providing the same legal advice under his law, assuming that the other lawyer can be liable on the basis of ordinary negligence (which is true of the vast majority of member states' laws). A lawyer giving advice under Greek law need not apply the same level of care as a lawyer whose office is for instance in Germany.

We consider it probable that from such liability rules competitive disadvantages in the relevant foreign market may result for those for whom their own law does not provide a corresponding protection from liability. However, we received almost no responses to our indication to that effect in our second questionnaire. Only rarely (and without further explanation) was the existence of an obstacle or a relevant unequal treatment denied.

**70. France: doctor's and hospital's liability** An example from the second group is provided by the new French legislation on the liability of doctors and hospitals, in which elements of strict and fault-based liability are mixed. With the *Loi n° 2002-203* of 4th March 2002 a rule on the liability of hospitals and doctors was introduced in the French *Code de la santé publique*. Article L 1142-1, I *Code de la santé publique* implies that from this point on, doctors and hospitals are only liable for the damaging consequences of preventative, diagnostic or curative treatment, if they have made a *faute*. On the other hand the liability is strict (exception: where there is a so-called *cause étrangère*) for damage resulting from the defect of a *produit de santé*, and further for damage which arises in a hospital (not a doctor's practice) resulting from *infections nosocomiales*. Under this, every illness is encompassed which a hospital patient has contracted through micro-organisms.<sup>71</sup>

The conditions under which a Greek doctor or a Greek hospital is liable accordingly diverge consistently from those applicable to their French colleagues and to

<sup>70</sup> *Georgiades Ast.*, I evthini tu parechontos ipiesies, in: FS for Kiantou-Pampouki (1998) 143 (145, 149); *Karakostas*, Prostasia tou katanaloti (1997) 138; in-depth (in German) *Eleftheriadou*, Die Haftung aus Verkehrspflichtverletzung im deutschen und griechischen Deliktsrecht (2003).

<sup>71</sup> *Lambert-Faivre*, La responsabilité médicale: la loi du 30 décembre modifiant la loi du 4 mars 2002, *D.* 2003, 361-365 (362); *Patrick Mistretta*, La Loi n° 2002-1577 du 30 décembre 2002 relative à la responsabilité médicale. Premiers correctifs de la loi n° 2003-303 du 4 mars 2002, *JCP* 2003 éd. G, 165-166 (165).

French hospitals. Consequently the claims of patients, in particular claims for an appropriate sum for pain and suffering, depend on very different requirements in the law of the country in question. That in turn can be detrimental to patient mobility.

71. **The common ground of contract and tort law** Even if in the following text the differences between contract and tort law are being brought out, this must not hide the fact that in front of the background of the interference problem, there is often more common ground between the two areas than differences. In particular in the areas of liability for negligence it always seems that not even the courts see a reason to pose the question in whatever form, of whether the granted claim for compensation of one contracting party to the detriment of the other has its legal grounds in contract or tort law.<sup>72</sup> Often the starting point in contract and tort law, where a duty to compensate requires fault, is the same,<sup>73</sup> and practically speaking questions of qualification only have to be dealt with where it concerns, either in contract or tort law, one of the numerous exceptions to this basic principle. In the Italian literature on this subject the question is posed, of whether the distinction between contract and tort law in principle should be maintained at all; both establish in the end liability to compensate from a breach of duty. However, this kind of reasoning is inconsistent with the rule of law, which in every system distinguishes contract and tort, subjecting the two liabilities to more or less different regimes.<sup>74</sup> The question of the organization of individual legal material on contract or tort law can therefore not be avoided or brushed under the table with discussions. Examples of this can be found in all legal systems, for example in Italy *culpa in contrahendo*, medical malpractice, damage arising from defective goods caused to the buyer (art. 1494 Italian CC) and liability under construction contracts with regard to damage suffered by third parties (art. 1669 CC).

## (1.) Dependence of Liability on Fault

### (a) Tort law

72. **Strict liability and negligence based liability** We have already given an overview of the basic structures of fault-based and non-fault-based non-contractual liability. In most of the states of the European Union, now as before, negligence-related liability is right at the fore of legal regulation and the practical handling of cases. The most important

<sup>72</sup> See from a wealth of conceivable references just recently *Coxall v Goodyear Great Britain Ltd.* [2002] EWCA Civ 1010; [2003] 1 W.L.R. 536 (concerning the liability of an employer with respect to an employee for negligent omission of welfare duties in respect to the asthma of the employee).

<sup>73</sup> It is so for example (further countries and peculiarities in the text to follow), in Sweden also, compare chap. 1 § 1 with chap. 2 § 1 of the Liability Act there (*skadeståndslag* [1972:207]) and on this *Rodhe*, *Obligationsrätt*<sup>2</sup> (1984) 528.

<sup>74</sup> *Mengoni*, *Responsabilità contrattuale*, in *Enc. dir.*, XXXIX (1988) 1072; *v. Bar*, *Gemeineuropäisches Deliktsrecht I* (1996) 2; *Castronovo*, *La nuova responsabilità civile*<sup>2</sup> (1997) 186.

exception to this may be France, where it is taken that *gardien* liability has also statistically surpassed the rank of liability for negligence.<sup>75</sup> The wide basis on which strict liability is based in Italian law is of further great practical significance.<sup>76</sup>

**73. Culpa cuasi-objetiva: Spain** Regardless of a completely different legal starting point the same is finally true today for Spanish law, whose developments will be succinctly shown in the following text. Here there is a tort law system,<sup>77</sup> which indeed from the exterior bases liability on fault (*culpa*), which in its contents is transformed into strict liability. The Spanish Código Civil limited itself in arts. 1905-1910 to making special provision for specific, narrowly defined dangerous things and activities, such as animals, buildings, machines, explosives, trees and stores of contaminated materials; there are no general clauses with regard to strict liability as found in Italy and Portugal. In art. 3 (1) Spanish CC there is however, a rule of interpretation which, boldly used, gives the law vast space to manoeuvre. It is provided that 'Rules are to be interpreted according to the meaning of the words, taking into account the context, the historical and legislative circumstances and the social reality of the time in which they are to be applied, with the spirit and objectives of those rules being fundamental'. The *Tribunal Supremo* has taken this provision to heart and adapted Spanish liability law to the 'developments of the time' in developing, under the guidance of the 'principles of victim protection', a risk or 'use of thing' liability (*responsabilidad por riesgo* and *responsabilidad por el uso de las cosas* respectively)<sup>78</sup> far from the orthodox principles of negligence liability. Developments began with a 1943 road traffic accident judgment.<sup>79</sup> A cyclist was killed by a car in unexplained circumstances. The *Tribunal Supremo* assisted the deceased's dependents with a two-fold presumption. Firstly, it was probable, and thus presumable, that the motorist had infringed road traffic rules; secondly, it could thus be concluded that the injury of the cyclist occurred due to the motorist's fault. The second great step came in 1974.<sup>80</sup> There, a lift car became inexplicably detached and dropped to the bottom of its shaft, injuring a passenger. There was no basis for a presumption of misconduct by the lift owner. The victim's claim was nonetheless successful on the basis of 'presumed fault'. In

<sup>75</sup> Things should have already been this way in 1971 according to *Rodière*, La responsabilité délictuelle dans la jurisprudence (1978) 2.

<sup>76</sup> Arts. 2050 (liability due to the practice of dangerous activities) and 2051 (liability of a person who has *custodia* over an object) ital. CC.

<sup>77</sup> The tort law norms of the Spanish CC are only applicable to civil law obligations which arise: "from such actions and omissions that are forbidden or where some kind of fault or negligence makes itself present"(art. 1089 CC). On the other hand they do not apply to obligations which can give rise to compensation which: "result from criminal offences or breach of regulation rules". These are focused much more: "according to the provisions of the Penal Code" (Art. 1092 CC), meaning following arts. 109 ff. Código Penal (Ley Orgánica 110/1995, de 23 November 1995, del Código Penal, BOE no. 281, of 24th November 1995). Only "those that arise from such actions or omissions, in which fault or negligence makes itself present and are not subject to statute to punishment", are subject to arts. 1902 ff CC (Art. 1093 CC).

<sup>78</sup> T.S. 5th July 1989, RAJ 1989 no. 5297 p. 6092.

<sup>79</sup> T.S. 10th July.1943, RAJ 1943 no. 856 p. 481.

<sup>80</sup> T.S. 14th January 1974, RAJ 1974 no. 166 p. 123.

the view of the Court the reversal of the burden of proof was justified by the ‘internal dangerousness’ of the damaging thing and the fact that the owner derived a benefit from it. This justification, which had long been applied to motorised road transport, was equally applicable to the lift, the presence of which increased the value of the building. Dangers and benefits of the thing concerned (*cuius commoda, eius et incommoda*) became central in justifying the objectivisation of the common Spanish liability law. Of the two, the dangers appeared initially predominant. Where a minor drove a tractor between two haystacks, unintentionally setting one alight, his father was found liable through the reversal of the burden of proof, on the basis that the particular use of the tractor was objectively dangerous.<sup>81</sup> Prior to that, an employer had been held liable to the dependents of an employee killed by an electric shock. The fault presumption was derived from the danger to which the employee had been exposed. It was stated that ‘The act or omission resulting in the damage is always to be presumed to have been wrongful, unless the defendant can prove that he acted with the foresight and care which the circumstances of time and place required, without limiting himself to the fulfilment of statutory requirements.’<sup>82</sup> This formulation, to be repeated in numerous cases,<sup>83</sup> was apparently used increasingly to reduce a defendant’s scope for discharging his burden of proof. Thus where the presumption of fault requires that the defendant apply all possible care, (*agotamiento de la diligencia*) it effectively requires proof of an inevitable accident or act of God. Indeed there is in this context a series of decisions awarding compensation where ‘measures taken to prevent the sustained damage were insufficient, demonstrating that under the circumstances, the requisite standard of care was not exercised.’<sup>84</sup> Modern Spanish liability law may thus be divided into three parts: liability under *culpa clásica*, under *culpa cuasi-objetiva* and under ‘real’ statutory strict liability regimes, the texts of which abstain from the requirement of *culpa*.<sup>85</sup> At the centre of the system, both theoretically and practically, lies *culpa cuasi-objetiva* liability,<sup>86</sup> in which – subject to porous boundaries – particularly dangerous activities requiring the application of all possible care play a special role. *Culpa clásica* liability has not become obsolete but has been restricted to activities which are either seen as being essentially safe or in respect of which policy considerations militate against an objectivised liability. Professional,<sup>87</sup>

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<sup>81</sup> T.S. 14th March 1978, RAJ 1978 no. 815 p. 721.

<sup>82</sup> T.S. 11th March 1971, RAJ 1971 no. 1234 p. 889.

<sup>83</sup> Thus in T.S. 20th December 1982, RAJ 1982 no. 7698 p. 519, T.S. 21st November 1990, RAJ 1990 no. 9014 p. 11476, T.S. 23rd September 1991, RAJ 1991 no. 6060 p. 8379, T.S. 28th April 1992, RAJ 1992 no. 4466 p. 5917 and T.S. 25th February 1992, RAJ 1992 no. 1554 p. 1936.

<sup>84</sup> T.S. 20th December 1982, RAJ 1982 no. 7698 p. 5114.

<sup>85</sup> *Morales/Sancho*, Manual práctico de Responsabilidad Civil<sup>2</sup> (1995) 43.

<sup>86</sup> *Morales/Sancho loc. cit.* 46.

<sup>87</sup> In respect of architects, see T.S. 24th May 1990, RAJ 1990 no. 3836 p. 5095 and regarding other services de Ángel Yáñez, *Tratado de Responsabilidad civil*<sup>3</sup> (1993) 245. In T.S. 5th July 1991, RAJ 1991 no. 5568 p. 7502 the rules of *culpa clásica* were applied to trade union in its function as legal advisor. Similarly, in AP Murcia 12th December 1996, RAJ (TSJ y AP) 1997 no. 2385, where a hospital visitor slipped on a wet floor at 8 am, it was held the burden of proof

especially medical<sup>88</sup> liability (although there are many exceptions)<sup>89</sup> and liability for sports accidents are examples of the second group.<sup>90</sup> The *Tribunal Supremo* also found 'risk theory' liability inapplicable where a bank customer was attacked at midnight in an automatic cash dispenser hallway. The action against the bank failed.<sup>91</sup> Equally unsuccessful were the actions of dependents against the employer of a public transport ticket office worker who was shot by robbers,<sup>92</sup> and against a security company whose employee shot himself with his company pistol. The company was not required to have known of the employee's schizophrenia. His family conversely had been aware: under the circumstances there was accordingly no basis for the employer's liability under the 'source of danger' theory.<sup>93</sup> Contrarily, quasi-objective liability applies undoubtedly to the operator of an amusement park 'pirate ship', in the cage of which guests may injure each other,<sup>94</sup> to businesses employing dangerous tools<sup>95</sup> and to motorists whose tyres burst.<sup>96</sup> Being linked to the 'all possible care' requirement,<sup>97</sup> quasi-objective liability is particularly prominent with respect to motorised road traffic, fires caused by railway trains or fireworks, the possession and use of highly flammable substances, electrical installations and equipment, accidents involving noxious gases and explosives and accidents occurring on building sites and public buildings and swimming pools.<sup>98</sup> The boundary to a purely causation-based liability is however never crossed: inevitable

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should only be reversed in respect of the realisation of risks particular to hospitals, which was not the case here.

<sup>88</sup> T.S. 6th November 1990, RAJ 1990 no. 8528 p. 10923, T.S. 11 March 1991, RAJ 1991 no. 2209 p. 2937 and T.S. 11th February 1992, RAJ 1992 no. 1419 p. 1785.

<sup>89</sup> Influenced by the principle of strict public authority liability (*Morales/Sancho*, loc.cit. 413), medical negligence is particularly 'quasi-objective' in respect of actions intending a specific result, such as cosmetic surgery (T.S. 7th February 1990, RAJ 1990 no. 668 p. 773), defective materials and equipment (T.S. 5th May 1988, RAJ 1988 no. 4016 p. 3941 concerning broken oxygen leads and T.S. 12th May 1988, RAJ 1988 no. 4089 p. 4024 concerning contaminated sutures) and the purity of transfused substances such as inoculations, sera and blood (T.S. 5th June 1991, RAJ 1991 no. 5131 p. 6907). The court came close in T.S. 25th April 1994, RAJ 1994 no. 3073 p. 4169 to finding a duty in respect of the result in a case concerning a post-vasectomy recanalisation operation.

<sup>90</sup> T.S. 22nd October 1992, La Ley 1994 (3) p. 449, also at RAJ 1992 no. 8399 p. 11045. Cf. T.S. 13th February 1997, RAJ 1997 no. 701 p. 1105, in which the claim in risk liability against the local council of a man injured by a cow after climbing into the arena with it during a fair was rejected.

<sup>91</sup> T.S. 1st April 1997, RAJ 1997 no. 2724 p. 4127.

<sup>92</sup> T.S. 23rd December 1997, RAJ 1997 no. 9343 p. 14948.

<sup>93</sup> T.S. 5th December 1994, RAJ 1994 no. 9406 p. 12353.

<sup>94</sup> AP Ciudad Real 17th January 1996, RAJ (TSJ y AP) 1996 no. 24 p. 28.

<sup>95</sup> T.S. 30th May 1992, RAJ 1992 no. 4832 p. 6359.

<sup>96</sup> T.S. 14th June 1997, RAJ 1997 no. 2888 p. 4382.

<sup>97</sup> The general concept allowing such porous boundaries is that the objectivisation of liability should be proportionate to the degree of risk created: T.S. 20th January 1992, RAJ 1992 no. 192 p. 240.

<sup>98</sup> Examples taken from *Cavanillas Múgica*, La transformación de la responsabilidad civil en la

accidents, including the sole fault of the plaintiff, continue to exclude liability.<sup>99</sup> Indeed, in a recent case involving a passenger's fall from an open train door, the *Tribunal Supremo* returned to the concept of liability for probable misconduct: the railway was held not to be liable as there was no evidence of fault on its part.<sup>100</sup>

**74. Protected interests** Next to such peculiarities of individual legal systems, which have practically broken down the difference between so-called "strict" and so-called "fault-based" liability, it also needs to be considered that there is a yawning gap not only between the concrete areas of application of the relevant rules of strict liability, but also between the forms of damage which each regards as meriting compensation. The latter does not only concern the question of the ability to compensate for non-pecuniary loss. It is much more about the question, which from the point of view of some legal systems is to be answered first, namely what interests are protected at all, a question which can not only be answered differently in the relationship of contract/tort, but also in the relationship of non-contractual negligence liability/strict liability. Disregarding the very few exceptions, German<sup>101</sup> and Austrian<sup>102</sup> law, for example, only recognize strict liability in the law of injuries to body and health as well as damage to property. The Product Liability Directive is an expression of this concept.<sup>103</sup> In the area of the French *responsabilité du fait du choses* and *du fait d'autrui* it comes, however, in principle from the same term for damage which comes into fruition in the *responsabilité délictuelle et quasi-délictuelle* after arts. 1382 and 1383 CC.<sup>104</sup> In Spain it already stands exactly in this way, because the quasi-objective liability there was supported by the general tort law. For Portugal the same result is produced from the system of the Portuguese CC, whose compensation law (arts. 562-572 CC) applies to contract law as well as the law of tort and strict liability.<sup>105</sup>

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jurisprudencia (1987) 83. See also T.S. 29th May 1972, RAJ 1972 no. 2590 p. 1950 concerning a traffic accident on a level crossing and T.S. 20th December 1982, RAJ 1982 no. 7698 p. 5114.

<sup>99</sup> Eg. T.S. 26 May 1997, RAJ 1997 no. 4242 p. 6388.

<sup>100</sup> T.S. 4th February 1997, RAJ 1997 no. 677 p. 1049.

<sup>101</sup> See for example § 833 sentence 1 BGB, §§ 1 ff. HaftPflG, § 7 StVG, § 33 LuftVG, §§ 25 f. AtomG, § 84 AMG, § 32 GenTG, § 1 ProdHaftG, § 1 UmweltHG. Only § 22 WHG on the other hand, contains no limitation on bodily, health or property damage, includes principally therefore pure economic loss, compare with BGH 23rd December 1966, BGHZ 47, 1, 13; BGH 21st January 1988, BGHZ 103, 129, 140; BGH 6th May 1999, NJW 1999, 3203 f.

<sup>102</sup> Following § 1 EKHG, the most important case of strict liability in Austrian law, the compensation of pure economic loss is excluded (*Schauer* in Schwimann, ABGB VIII<sup>2</sup> [1997], § 1 EKHG). Also under § 146 Luftfahrtgesetz, § 1 Atomhaftpflichtgesetz, § 1a Reichshaftpflichtgesetz, § 1 Polizeibefugnisentschädigungsgesetz, § 1 Produkthaftpflichtgesetz and § 79a Gentechnikgesetz pure economic loss is not compensated. Things are only different (as in Germany) under § 26 of the Austrian Water Act.

<sup>103</sup> Following art. 9 only damage resulting from killing, bodily injury and property damage is compensatable.

<sup>104</sup> See in particular *Geneviève Viney and Patrice Jourdain*, *Traité de Droit Civil. Les conditions de la responsabilité*<sup>2</sup> (Paris 1998), no. 246 p. 1 ("*nous examinerons d'abord le "dommage" (...) et la "causalité" qui sont définis de manière analogue pour tous les types de responsabilité*").

<sup>105</sup> *Antunes Varela*, *Obrigações em Geral* I<sup>10</sup>, 876 ff. See also *Vaz Serra*, *Fundamento da*

Common Law on the other hand has by no means carved out a unified term for damage. What constitutes “damage”, can be answered differently from tort to tort. The liability already referred to from the rule in *Rylands v. Fletcher*, for example, merely concerns damage from the interference of the use of a piece of land; certain forms of trespass, however, do not even require actual damage (or loss).

**75. Reversal of the burden of proof: general** In many continental legal systems within the member states the legislator operates (and often, beyond its limitations, also the courts) with a reversal of the burden of proof in respect of the fault of the defendant. The basic rule of the law on the distribution of the burden of proof reads in general that every party has to prove and expound the requirements of a rule favourable to them (e.g. art. 1315 Belgian, French and Luxembourgian CC; art. 338 Greek CC, art. 342 (1) in conjunction with art. 487 (1) Portuguese CC, art. 2697 Italian CC, § 1296 Austrian ABGB). There are, however, numerous exceptions to this fundamental distribution of the burden of proof, and where it concerns fault as a prerequisite for liability, in the practical end result it can likewise involve strict liability. A duty to compensate appears in cases in which the fault of the defendant is not proved (and the proof of exculpation is not successful).

**76. Civil law countries: judge-made rules** The intensifications of liability through the means of the reversal of the burden of proof are typical hallmarks of the jurisdictions of Civil Law. Particularly developed here is, as has just been outlined, Spanish law. Comparable judicial updating of the law can also be found in Germany, albeit limited to certain groups of cases. For the area of product liability the German Federal High Court of Justice since the so-called “*Hühnerpest*” decision<sup>106</sup> favoured the injured parties (it involved *in casu* a trader, not a consumer) in so far as negligence of the manufacturer is presumed, and that the defect in the product caused the damage. Also in the area of environmental liability such developments have taken place.<sup>107</sup> In the case of a breach of a so-called protective law (“Breach of statutory duty”), fault is rebuttably presumed, if the objective breach of the protective law is established. According to case law, however, this only applies, if the protective law outlines the required conduct in such terms that in bringing about the (objective) “*actus reus*” an inference as to the (subjective element of) implicated fault is within hands’ reach.<sup>108</sup> If the protective law, however, is limited to prohibit a particular injurious outcome, the mere infringement of such a prohibitive norm does not produce the implication of fault.<sup>109</sup> In Austrian law the already mentioned

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responsabilidade civil (em especial, responsabilidade por acidentes de viação terrestre e por intervenções lícitas), BolMinJus 90 (1959) 196: “In the area of objective liability there should be no limitations of compensatable damage, because the reasons for this special liability includes all damage that is compensatable according to general rules”.

<sup>106</sup> BGH 26th November 1968, BGHZ 51, 91, as corrected in BGH 17th March 1981, BGHZ 80, 186, 196 f.

<sup>107</sup> BGH 18th September 1984, BGHZ 92, 143.

<sup>108</sup> BGH 19th November 1991, BGHZ 116, p. 104, 114 f.; BGH 17th January 1984, VersR 1984, 270, 271.

<sup>109</sup> BGH 19th November 1991, BGHZ 116, 104, 115.

basic rule in § 1296 ABGB (the injured party carries the burden of proof for the lack of care by the tortfeasor) is superseded by § 1298 ABGB, where it falls on the debtor of the non-performance of a contractual or legal obligation to provide proof, that this happened without a breach of care on his part. The burden of proof for the unknown (subjective) fault also in the area of torts lies with the tortfeasor.<sup>110</sup> This applies in particular for the cases of breach of protective laws under § 1311 sentence 2 ABGB.<sup>111</sup> Also in Greece the jurisdiction has accepted explicit lightening of the burden of proof in the area of product liability.<sup>112</sup> This complex has in the meantime been expressly regulated in the consumer protection law (law 2251/1994). Important in this law, is that with art. 8 a reversal of the burden of proof is introduced in respect of fault in the area of liability for defective services.

**77. Common law countries** Common Law, on the other hand, almost never produces such reversals of the burden of proof. It manages in principle without these reversals, because procedurally it operates with a different rule on evidence. According to this rule it does not matter, that evidence has convinced the court so much that all “doubts are silent”,<sup>113</sup> but it is of importance that the respective averment is more probable than the one opposing it (“on the balance of probabilities”). In the practical end result, however, this probability test can have the same effect as a real reversal of the burden of proof.<sup>114</sup> It has to be considered in this context, however, that the lightening of the burden of proof in this way only affects the causation and not the fundamental principles of the negligence judgment.

**78. Civil law countries: statutory provisions** Reversals of the burden of proof in respect of negligence or causation of damage are, in Civil Law countries, often arranged in special provisions within their respective civil codes. Legal presumptions of fault have the purpose of putting the burden of proof on the defendant. Examples of this legislative technique are found in many areas of liability law, for example in the liability of parents regarding their children (§ 832 of the German BGB, art. 491 Portuguese CC, art. 923 Greek CC, art. 1384 (2) and (5) Belgian CC) and in the liability for buildings (see for example art. 492 Portuguese CC, § 1319 Austrian ABGB [completely different – liability only where there is proven premeditation or proven gross negligence – however the liability for defective highways under § 1319a ABGB] and §§ 836-838 of the German BGB), but also in the liability for misleading advertising (art. 6:195 Dutch BW) and the liability of employers either vis-à-vis their employees (art. 7:658 Dutch BW) or vis-à-vis of third parties (§ 831 German BGB). It is not seldom that the absence of such a statutory presumption of fault is compensated by case law, which goes some way to assisting the victim (as a matter of procedural law) by means of *res ipsa loquitur*.<sup>115</sup>

<sup>110</sup> Further *Reischauer*, JBl 1998 p. 473-487, 560-570.

<sup>111</sup> OGH 25th July 2000, SZ 73/118.

<sup>112</sup> CA Thessaloniki 1259/1977 Arm. 32/1978, 121.

<sup>113</sup> This is the standard formulation in German case law, see BGH 17th February 1970, BGHZ 53, 245, 256.

<sup>114</sup> For a recent example see *Fairchild v Glenhaven Funeral Services Ltd.* [2002] 3 W.L.R. 89 (HL).

<sup>115</sup> Compare for example with Portugal STJ 26th February 1992, BolMinJus 414 (1992) 533.

**79. Presumptions of liability** Occasionally one even comes across so-called presumptions of liability. Then it is not merely about the reversal of the burden of proof for negligence, but it involves the irrefutable assumption of negligence and consequently the introduction of strict liability in the guise of negligence terminology. A *présomption de responsabilité* can only be refuted with the proof of a *cause étrangère*, likewise a *force majeure* or a *fait de la victime* or a *fait* of a third party.<sup>116</sup> The French case law, for example, after art. 1384 (4) French CC has conceived liability of parents in this way. The measure was originally inferred from a bare *présomption de faute*.<sup>117</sup> Today it is interpreted in the sense of a *présomption de responsabilité*,<sup>118</sup> which for its part naturally can not leave the grounds of liability untouched,<sup>119</sup> (art. 1384 para. 4 CC along with *Loi n° 2002-305* from the 4th March 2002 were linguistically brought into line with the requirements of modern family law; that did not, however, result in a change to the contents). The previously mentioned interpretation of art. 1903 of the Spanish CC by the Spanish courts not only has to do with a bare burden of proof, but also with presumptions of liability.

**80. The main areas of application of conventional fault-based liability** With the background of the varied shifts of the borders between strict liability and “fault-based” liability, it has become everything else but simple to define the areas more exactly, in which tort law now as before is alone in being of importance in “classical” fault-based liability. There is scarcely a single opinion or statement which would be correct, without exception, from the perspective of all the European legal systems. A guiding hand is lacking; things have been completely spun about in a whirl of multiplicity and terminological imprecision and, looked at from a pan-European standpoint, lie about in a virtually chaotic state. All that one can say with a half-claim to general applicability is that the liability for accidents in the private sphere (in the household, in sport and leisure) and the liability for service provision jobs have at least as a rule remained fault-based (exceptions here naturally concern, on the other hand, liability for things under one’s *garde* and liability for third parties).

**81. Notion of fault** Finally it needs to be pointed out, that there is no unified term for fault in the European tort law orders. That also applies to the term of “intention”, (for example in the sense of English and Irish Common Law “intention” can have a different meaning from tort to tort) as well as for the term “negligence” in the sense of carelessness or *faute*. The latter is indeed at least mostly interpreted as a deviation from the standard of the objective requisites in legal relations, however that is neither generally safeguarded, nor does it exclude system differences. Under the new Dutch BW for example “fault” and “objective accountability from the point of view of conventional norms” (*verkeersopvatting*) are located next to each other with equal importance, which

<sup>116</sup> le *Tourneau/Cadiet*, Droit de la responsabilité et des contrats (2000/2001), no. 2364.

<sup>117</sup> Cass.civ. 12th October 1955, D. 1956 Jur. 301, note *René Rodière*.

<sup>118</sup> Cass.civ. 19th February 1997, Bull. civ. 1997, II, no. 56 p. 32; Cass.ass.plén. 13th December 2002, Gaz.Pal. 22-24 December 2002, p. 8-9; Gaz. Pal. 7-8 March 2003, p. 52, note *Chabas*; *recitificatif*: Cass.ass.plén. 17th January 2003 D. 2003, p. 591, note *Jourdain*.

<sup>119</sup> le *Tourneau/Cadiet*, Droit de la responsabilité et des contrats (2000), no. 2364.

in turn justifies the assumption, that the Dutch BW uses a subjective term for fault in the sense of personal reproachability.

(b) Contract law

82. **General** In contract law one also comes across a multitude of different starting points in relation to the question of whether the liability for damage as a consequence of breach of contract should be strict or fault-based, whereby in the latter case it is in turn differentiated whether the plaintiff or the defendant carries the burden of proof. Under PECL the liability for breach of contract is in principle strict. The PECL bind the basic rule on the fulfilment and compensation requirements to the absence of an excuse (art. 8:108 (2)), and in art. 8:108 (1) (Excuse Due to an Impediment) they add: “(1) A party’s non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.”

83. **Belgium, France, Luxembourg: general** In the French legal system the burden of proof rule for contract law liability matches in important areas the burden of proof rule for tortious liability due to one’s own misconduct. Thus the plaintiff also carries the burden of proof in a contract law context in respect of the existence of damage as well as a link in causation between the damage and the non-performance of the contract.<sup>120</sup> An important difference exists, however, with the distribution of the burden of fault in respect of a *faute contractuelle* or a *défaillance contractuelle* (contractual non-performance). While in the system of tortious liability, following inappropriate conduct, it is as a rule normally the plaintiff, who has to produce the proof of a *faute délictuelle*, the proof of the absence of a *défaillance contractuelle* lies principally with the contractual debtor and therefore the defendant. This distribution of the burden of proof follows art. 1315 para. 2 CC. In legal literature it is pointed out that the rule in art. 1315 para. 2 CC only displays its full strength, if the contract remains totally unperformed (it deals with *une inexécution totale*). If the contractual debtor provides the evidence that he has fulfilled the fundamental contractual duties, the contractual obligee has to state why the already performed contractual duties are insufficient.<sup>121</sup> The differentiation between the contractual *obligations de résultat* and the *obligations de moyens* then appears. If the contractual debtor was obliged to fulfil an *obligation de résultat*, it falls on the obligee only to prove that the result owed was not achieved. If the contractual debtor however, was only obliged to fulfil an *obligation de moyens*, the obligee has to prove, that the debtor *a été défaillant dans l’emploi des moyens*.<sup>122</sup> In the Belgian legal system as well, art. 1315 CC forms the starting point for the distribution of the burden of proof in respect of the existence and the non-performance of contractual obligations. As in the French legal system, in the Belgian, the *obligations de résultat* and the *obligations de moyens* are differentiated. The debtor of an *obligation de résultat* can only avoid liability with the proof of a

<sup>120</sup> *le Tourneau/Cadiet* loc.cit. no. 2360.

<sup>121</sup> *le Tourneau/Cadiet* loc.cit. no. 2361.

<sup>122</sup> *le Tourneau/Cadiet* loc.cit. no. 2363.

*cause étrangère*. In the case of an *obligation de moyens*, on the other hand, the obligee has to provide the proof of improper performance.<sup>123</sup>

**84. Seller's guarantee** The law relating to the seller's guarantee for defects in the good sold is the subject of arts. 1641 ff. CC in Belgium, France and Luxembourg. In accordance with art. 1641 CC the seller is obliged to provide a guarantee for the latent defects of a good sold, which make the good unfit for its appropriate use, or which reduce the ability to use it so much, that the buyer would not have purchased it or would only have paid a reduced price for it, if he had known about the defect. In Belgian and French legal literature it is pointed out that the term "thing" does not just include industrial products, but rather all goods and therefore likewise realty, animals and natural products.<sup>124</sup> In accordance with art. 1642 CC the seller is not liable for visible defects which the buyer could have noticed. In accordance with art. 1643 CC the seller is liable for the latent defects even when he did not know about them, it being the case that for such a situation he has insisted that he does not owe a guarantee. In accordance with art. 1644 CC the buyer has the choice in cases under articles 1641 and 1643, either to return the goods and be refunded with the purchase price, or to keep the goods and receive part of the purchase price back, estimated by an expert. In accordance with art. 1645 of the Belgian and French CCs a seller who knew the good was defective, is obliged to fully compensate the purchaser as well as refunding the purchase price. Art. 1645 of the Luxembourgian CC was altered in 1985 and since then allows for (para. 1) a professional manufacturer or seller to be treated as having known of the defect. The provision is mandatory in the relationship with a customer (*consommateur final privé*) (para. 2). In accordance with art. 1646 of the Belgian, French and Luxembourgian CCs a seller who did not know about the defect of a good is only obliged to reimburse the purchase price and pay the purchaser the costs incurred in the purchase. The equal treatment of a professional seller with a seller in bad faith, which is explicitly ordered in the Luxembourgian legal system in art. 1645 CC, has its origin in the case law of the French *Cour de Cassation*.<sup>125</sup> The Belgian *Cour de Cassation* handles this principle in a somewhat milder form: The professional seller is only treated equally to a seller in bad faith, if the first can not prove that he could not possibly have known of the defect.<sup>126</sup> The contractual claim for compensation not only relates to the damage which is present in the good, but also to all other damage which the purchaser has suffered through the defect.<sup>127</sup> If a third party has suffered

<sup>123</sup> B.H. Verb. (-*Minjauw*) VI-2, no. 5106.

<sup>124</sup> *Malaurie/Aynès/Gautier*, *Contrats spéciaux*<sup>14</sup>, no. 394 p. 280. See for Belgium also: *Herbots/Pauwels/Degroote/Lamine/Convent*, *Overzicht van Rechtspraak. Bijzondere Overeenkomsten* (1988-1994), TPR 1997 (647-1281) (721 no. 94) (sale of a *fonds de commerce*).

<sup>125</sup> *Fundamental Cass.civ.* 19th January 1965, Bull. civ. 1965, I, n° 52 p. 59. In particular the court stressed in this decision that "*il résulte des dispositions de l'article 1645 (...) que le vendeur, qui connaissait ces vices, auquel il convient d'assimiler celui qui par sa profession ne pouvait les ignorer, est tenu, outre la restitution du prix qu'il a reçu, des tous dommages-intérêts envers l'acheteur*".

<sup>126</sup> *Herbots/Pauwels/Degroote/Lamine/Convent*, loc. cit. p. 729 no. 103.

<sup>127</sup> *Malaurie/Aynès/Gautier* loc.cit no. 411 p. 293; CA Bruxelles 22 November 1991, RGAR 1993, 12237.

damage as a result of the defect, only a tortious claim is possible.<sup>128</sup> In the case that the sold object is a yet to be constructed immovable (*un immeuble à construire*), arts. 1642-1 and 1646-1 of the French and Luxembourgian CCs contain additional protecting regulations for the purchaser. In accordance with art. 1647 of the Belgian, French and Luxembourgian CCs the seller meets the loss of a good having perished due to a faulty composition. The purchaser, however, is financially liable for a loss caused by chance. Finally, article 1648 of the Belgian, French and Luxembourgian CCs contains the rule that the purchaser has to make his claim within a short time period.

The relevance to the internal market of rules of this type is manifest. It constitutes one of the grounds as why parties to a cross border contract constantly seek to have their own law govern their dealings. The responses to our first questionnaire confirm that this is the case. Should, for example, a German exporter of clothing in his contract with a French wholesaler agree that French law is to be the law applicable to the contract, the German exporter has to be prepared to take on board rules which from his point of view will come as a considerable surprise, such as liability for losses resulting from latent defects. In German law the supplier is firstly entitled to remedy the defects or, as appropriate, supply a replacement; generally he only comes under an obligation to compensate for loss where there was fault.

Our questionnaire confirms this. In particular there is concern amongst German businesses about French (contract) law, which is regarded as much severe, prompting the attempt either to agree on German (or some other) law or, if that does not succeed, to incorporate a “substantial hazard” as part of the calculations. At any rate the attempt is made to avoid the application of French law.

**85. Liability of constructeurs under French law** Of considerable practical significance is the strict *responsabilité des constructeurs* (arts. 1792 to 1792-6 in comparison with art. 2270 CC), which was introduced in France with law n° 78-12 of the 4th January 1978 in the *Code civil*, in order to ameliorate the protection of clients of building work and in order to promote the construction of stable buildings in the general public interest.<sup>129</sup> Art. 1792 of the French CC reads as follows:<sup>130</sup> “Any builder of a work is liable as of law, towards the building owner or purchaser, for damages, even resulting from a defect of the ground, which imperil the strength of the building or which, affecting it in one of its constituent parts or one of its elements of equipment, render it unsuitable for its purposes. Such liability does not take place where the builder proves that the damages were occasioned by an extraneous event.” Freedom from liability only comes with the proof of a *cause étrangère*, which for its part is defined through the criteria of the *imprévisibilité*, *irrésistibilité* and *extériorité*.<sup>131</sup> In accordance with art. 1792-5 CC this liability can not be

<sup>128</sup> *Herbots/Pauwels/Degroote/Lamine/Convent* loc.cit. p. 735 no. 111; *Malaurie/Aynès/Gautier* loc.cit. no. 421 p. 299.

<sup>129</sup> Further *Dutilleul and Delebecque*, *Contrats civils et commerciaux*<sup>6</sup> (2002) no. 752 p. 660.

<sup>130</sup> Translation after *Rouhette and Berton*, available online under: [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm).

<sup>131</sup> *Dutilleul/Delebecque*, loc.cit. no. 757 p. 663.

contractually set aside. Art. 1792-1 CC defines: “The following are to be regarded as builders of the work: 1° Any architect, contractor, technician or other person bound to the building owner by a contract of hire of work; 2° Any person who sells, after completion, a work which he built or had built; 3° Any person who, although acting in the capacity of agent for the building owner, performs duties similar to those of a hirer out of work.” In article 1792-2 CC the presumption of liability of art. 1792 CC is expanded to “damages affecting the strength of the elements of equipment of a building”, in as far as they are “an indissociable and integral part of the works of development, foundation, ossature, close or cover”. In accordance with art. 1792-3 CC “the other elements of equipment of a building are the subject of a warranty of good running for a minimum period of two years after the approval of the work.” In accordance with art. 1792-6 paras. 1 and 2 CC, moreover, a “warranty of perfected completion” for the duration of one year from the time of the purchase of the building lies with the “contractor”. This warranty of perfected completion contains a duty to repair in respect of “all shortcomings indicated by the building owner, either through reservations mentioned in the memorandum of approval, or by way of written notice as to those revealed after the approval.”

A survey within German trade corporations showed that precisely this strict liability in conjunction with the ten year limitation period of art. 2270 CC is seen from the German point of view as a painful hindrance to competition. The trade corporations complain that German suppliers are also subject to the duty to conclude an insurance to cover possible guarantee claims (*une garantie/assurance-décennale*). This insurance (unknown in Germany) is expensive and not available without complications. Before the conclusion, the business is checked as to its qualifications and experience and the project is checked over for possible risks and their minimisation (for example through the overseeing by an architect). This is however, for foreign suppliers (from the French point of view) considerably more costly and time-consuming than for native suppliers.

**86. Italy** Art. 1218 of the Italian Codice Civile regulates the liability of the debtor in general. The basic rule is that a debtor who does not provide the proper performance owed is bound to compensate if he does not prove that the non-performance or delay was caused by an impossibility of performance unrelated to him (i. e. not due to his or his employees' fault). Specific adaptations of this basic rule are found in the laws of the particular contracts (for example arts. 1588, 1693, 1785, 1787, 1805 and 1839 CC). Exceptionally, proof may be demanded from the debtor that all suitable measures have been taken to avoid the damage (for example art. 1681 CC). In principle the matter turns on whether the care of a good *pater familias* has been taken (art. 1176 (1) CC). “In the performance of obligations inherent in the exercise of a professional activity, diligence shall be evaluated with respect to the nature of that activity” (art. 1176 (2) CC). Art. 1218 is extended through the general rule of fair conduct in art. 1175 CC. The basic tendency of contractual liability is objective.<sup>132</sup> The *obbligazioni di mezzi* and

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<sup>132</sup> Further amongst others *Visintini*, L'inadempimento delle obbligazioni, Responsabilità del debitore, in *Trattato di diritto privato*, 9, *Obbligazioni e contratti*, Tomo I, (1992) 157-161.

*obbligazioni di risultato* are differentiated by many authors,<sup>133</sup> others claim however, that (at least in certain types of cases) the debtor can avoid liability by proving his carefulness;<sup>134</sup> one can not disregard the principle role of fault in the liability of the debtor.<sup>135</sup> The authors of the first group mainly do not focus on art. 1218, but rather on art. 1176 CC, which sets up the duty of care as the standard of conduct for the debtor. This implies that liability as to the *obligations de moyens* is conceived as rooted in fault and that it is up to the creditor to prove the want of care in the conduct of the debtor.<sup>136</sup> The consequence of this though, would be a wide-reaching correspondence of the contractual and non-contractual liability in the area of the *obbligazioni di mezzi* and much of the question of overlap would be resolved at the outset. However on the other hand, there are objections that the idea that fault is also the basis for liability in contract law, is not consistent with the category of obligations. The latter implies in itself liability for non performance. In the law of obligations it is not therefore about the grounds for liability (they are found in the contractual promise itself), but about the exceptions to it. The debtor, from this point of view, must consequently be exonerated. It is said, moreover, that the economic analysis of contract law also points in this direction. Their results speak for an objective system of business liability.<sup>137</sup> Impossibility of performance “unrelated to the debtor” (Art. 1218 CC) is therefore interpreted today amongst other things, (exactly as in art. 8:108 PECL) as “an inevitable event that happens beyond control of the obligor.”<sup>138</sup> Independently of this, strict liability governs the duty to pay money, the supply of fungible goods and the supply of goods free from defects. The same applies for the liability of the bailee *ex recepto* and for the (already mentioned) enterprise liability.<sup>139</sup>

**87. Austria** In Austria according to the ABGB, the principle of fault is also the starting point for contractual liability.<sup>140</sup> Average abilities are assumed of the tortfeasor under § 1297 ABGB; lesser abilities have to be proved by him in the individual case.<sup>141</sup> With breaches of contract an objective concept of carelessness is used. Applying the notion of a guarantee, the obligor cannot excuse himself by pointing to lesser subjective

<sup>133</sup> See on this the critical study by Mengoni, *Obbligazioni di risultato e obbligazioni di mezzi*, in Riv. dir. comm. 1954, I, 185 ff; 280 ff.; 366 ff.

<sup>134</sup> Giorgianni, *L'inadempimento* (1975), passim, drawing a distinction according to the nature of the obligation to be performed and so not recognising exculpation for want of fault, for example, if the obligation is simply to pay money or to hand over specific things.

<sup>135</sup> Bianca, *L'autonomia dell'interprete: a proposito del problema della responsabilità contrattuale*, Riv. dir. civ. 1964, I, 478-498.

<sup>136</sup> Cf. Trimarchi, *Istituzioni di diritto privato*<sup>13</sup> (2000) 312, 320.

<sup>137</sup> Trimarchi, *Istituzioni di diritto privato* (1998) 339-341.

<sup>138</sup> Visintini, loc.cit. 173.

<sup>139</sup> Di Majo, *La responsabilità contrattuale* (1997) 72 ff.

<sup>140</sup> Gschnitzer, *Schuldrecht AT*<sup>2</sup> (1991), 34.

<sup>141</sup> OGH 10th November 1964, SZ 37/159; Reischauer in Rummel-ABGB II<sup>2</sup> (1992), § 1297 no. 12.

abilities.<sup>142</sup> An intermediate step<sup>143</sup> for liability without one's own inappropriate conduct, is represented by the shift of the burden of proof for objective inappropriate conduct (or fault)<sup>144</sup> in the case of an already existing contractual (or statutory) obligation (§ 1298 ABGB).<sup>145</sup> The defendant can be exonerated through the carrying out of the objective necessary care, or through the circumstance that he did not have to make up for the non-carrying out of the objective necessary care, taking into consideration subjective grounds.<sup>146</sup> Predominantly § 1298 ABGB is only applied to obligations of result.<sup>147</sup> A further approach to liability without inappropriate conduct can be seen in the increase of the objective duties of care for particular groups of people (experts) after § 1299 ABGB. The rule is likewise applicable for contract and tort law although it is of greater importance practically in contract law. Following this provision, an expert has to achieve the standard of performance of the professional group concerned.<sup>148</sup> A few general legal institutions are independent of fault and therefore of resulting compensation claims from contract law. The so-called objective delay produces the legal consequence of the possibility of termination from the contract and in the case of pecuniary debts the consequence of § 1333 ABGB (interest for delay). The claim is independent of fault<sup>149</sup> and there is no need to show actual damage in order to claim statutory interest.<sup>150</sup> The connections to the law of unjust enrichment in the rule are not left unconsidered in the process.<sup>151</sup> The subjective delay is fault-based<sup>152</sup> and entitles an injured party to compensation, which goes beyond the legal consequences of an ob-

<sup>142</sup> *Koziol*, *Haftpflichtrecht I*<sup>3</sup> (1997), Nr. 5/37. On the objectivisation of the term for negligence in tort law see *Harrer* in *Schwimann*, *ABGB VII*<sup>2</sup> (1997), § 1297 no. 11; *Reischauer* in *Rummel-ABGB II*<sup>2</sup> (1992), § 1294 no. 21.

<sup>143</sup> *Koziol*, *Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich*, *JBl* 1994, 209, 214; *Reischauer* in *Rummel-ABGB II*<sup>2</sup> (1992) § 1298 no. 3: compromise between fault and outcome liability.

<sup>144</sup> Further on these terms and their limitation *Koziol/Welser*, *Bürgerliches Recht II*<sup>12</sup> (2001), p. 301; *Koziol*, *Haftpflichtrecht I*<sup>3</sup> (1997), Nr. 16/28.

<sup>145</sup> *Reischauer* in *Rummel-ABGB II*<sup>2</sup> (1992), § 1298 no. 5 and *JBl* 1998, 473, 560; *Gschntzner*, *Schuldrecht AT*<sup>2</sup> (1991), 35.

<sup>146</sup> For example, if the delayed delivery of a good leads back to the transfer of the transport route through a "mudslide". With the proof of the causation due to the "mudslide" of the non-performance, the debtor proves the carrying out of care. See *Reischauer* in *Rummel-ABGB II*<sup>2</sup> (1992), § 1298 no. 2 f. *Koziol* (*JBl* 1994, 209, 214) refers in this connection to § 1447 ABGB (impossibility of performance not due to the debtor).

<sup>147</sup> *Reischauer* in *Rummel-ABGB II*<sup>2</sup> (1992), § 1298 no. 2 ff.; see also *OGH* 15. 2. 1990 *JBl* 1990, 723, contrary *OGH* 12. 11. 1992 *JBl* 1994, 47; overview on the position *Koziol/Welser*, *Bürgerliches Recht II*<sup>12</sup> (2001), p. 301.

<sup>148</sup> *OGH* 22. 10. 1992, *SZ* 65/136.

<sup>149</sup> Expert plenary decision of the *OGH* 8. 3. 1923, *SZ* 5/53: the non-performance of a contractual duty is in itself a fault.

<sup>150</sup> *OGH* (strengthened senate) 24th March 1998 *JBl* 1998, 312: compensation law minimum flat-rate; *Koziol/Welser*, *Bürgerliches Recht II*<sup>12</sup> (2001), p. 32.

<sup>151</sup> *OGH* loc.cit.; *Graf*, *Zinsen, Bereicherung und Verjährung*, *JBl* 1990, 350.

<sup>152</sup> On so-called strike fault see *OGH* 7th September 1988 *JBl* 1989, 175, note *Humel*.

jective delay. Only in this case is it possible for the creditor to demand compensation for delay<sup>153</sup> or loss amounting to his expectation interest. Even in the case of the compensation of the expectation interest, §§ 1323 f and 1331 f ABGB are to be used, so that missed-out on profit is only to be compensated for in the case of gross fault on the part of the debtor.<sup>154</sup> The making good of unsatisfactory performance (guarantee) is neither dependant on the fault nor the cause.<sup>155</sup> § 933a ABGB regulates at this point the relationship between the guarantee and fault-based compensation claims. Fault can also be present when the supplier has not corrected a defect in a good before the delivery.<sup>156</sup> The liability of a pub landlord for the “danger of a public house” is to be seen as strict liability.<sup>157</sup> It has connections with contract and tort law and also to the law of pre-contractual obligations. Under § 970 (1) ABGB pub landlords are liable for the accommodated strangers as bailee for the goods brought in by the guests, if the former can not prove that the damage was neither caused by them or one of their employees (fault-based liability), nor by strangers entering and leaving the house (causal liability). The liability under § 970 ABGB does not require a contract with the pub landlord.<sup>158</sup> The liability of the customer vis-à-vis his business partner under § 1014 ABGB is strict.<sup>159</sup> The prevailing opinion in Austria understands this duty to compensate as a non-fault-based risk liability for typical dangers of the commissioned business.<sup>160</sup> The basic concept of the rule is transferred to employment law<sup>161</sup> and the law of benevolent intervention in another’s affairs.<sup>162</sup> The liability from safe-deposit contracts (§ 964 in comparison with § 1298 ABGB), contracts for loan for use (§ 979 in combination with §§ 965 and 1298 ABGB) and toll contracts, on the other hand, are fundamentally fault-based (the exceptions can not be presented here due to reasons of scope).<sup>163</sup>

**88. Spain** Spanish contract law also follows the principle of *culpa*.<sup>164</sup> Those who conduct themselves, in respect of the performance of their obligations, in an intentional, negligent or defaulting way, or contravene the contents of the obligation in a way which

<sup>153</sup> Damage due to delay is to be compensated, if the debtor’s proof of exoneration is not successful under § 1298 (see *Reischauer* in *Rummel-ABGB I*<sup>3</sup> [2000] § 918 no. 22).

<sup>154</sup> *Koziol/Welser*, *Bürgerliches Recht II*<sup>12</sup> (2001) 55. Only different with commercial transaction.

<sup>155</sup> *Koziol/Welser*, loc.cit. 61.

<sup>156</sup> *Koziol/Welser*, loc.cit. 86.

<sup>157</sup> *Schubert* in *Rummel-ABGB I*<sup>3</sup> (2000) § 970 no. 7: a type of strict liability; *Koziol*, *Haftpflichtrecht I*<sup>3</sup> (1997), no. 6/7.

<sup>158</sup> *Binder* in *Schwimann*, *ABGB V*<sup>2</sup> (1997) § 970 no. 2 (with further references).

<sup>159</sup> *Koziol*, *Haftpflichtrecht I*<sup>3</sup> (1997), no. 6/7. *Faber*, *Risikohaftung im Auftrags- und Arbeitsrecht* (2001) p. 181, wants to impose higher standards for the the necessary probability of the realization of a risk with § 1014 ABGB, “as this is appropriate within the scope of strict liability”.

<sup>160</sup> *Koziol/Welser*, *Bürgerliches Recht II*<sup>12</sup> (2001) 198 f.

<sup>161</sup> OGH 31st May 1983, SZ 56/86; *Faber*, loc.cit., 239 ff.

<sup>162</sup> OGH 24th August 1995, SZ 68/142; *Rummel* in *Rummel-ABGB I*<sup>3</sup> (2000) § 1036 no. 4; *Faber* loc.cit., p. 258.

<sup>163</sup> OGH 29th April 1970, SZ 43/84.

<sup>164</sup> *Cavanillas Múgica and Tapia Fernández*, *La concurrencia de responsabilidad contractual y extracontractual. Tratamiento sustantivo y procesal* (1992) 21.

involves *culpa*, are bound to compensate for the damage and disadvantages caused (art. 1101 CC). Art. 1103 CC further adds that “liability for negligence ... can be equally asserted in the case of fulfilment of every type of obligation.” The *culpa* or *negligencia* is expressly defined in contract law (in contrast to tort law).<sup>165</sup> Following art. 1104 CC the *culpa* of the debtor exists from not taking appropriate care, which the nature of the obligation requires and which is in accordance with personal, temporal and location-related circumstances. If the obligation does not express which standard of care is to be used in its fulfilment, then the standard of care which corresponds to a good *pater familias* is called for. However, it should, in the current view, in no way be the necessary consequence of art. 1101 CC that the contractual liability can *only* be based on fault; intention and negligence are not the only grounds for contractual liability.<sup>166</sup> As with non-contractual liability, contractual liability permits an objectivisation,<sup>167</sup> and indeed in the two cases, from principally the same considerations (creation and control of a typical risk relating to a good or activity, the possibilities for control on a business level, the possibility of the conclusion of insurance).<sup>168</sup> The *Tribunal Supremo* has often followed these considerations on the objectivisation of contractual liability.<sup>169</sup> The text of art. 1101 CC also permits along with intention, negligence and delay, other grounds for liability to be accepted (for example the objective breach of another contractual duty), but also when in a concrete case the necessary care has been dispensed with. It is further important to know, that in Spanish contractual liability also there is a reversal of the burden of proof in respect of *culpa*. In contrast to non-contractual liability where the reversal of the burden of proof only falls back on judge-made law, with art. 1183 CC (“If the property is lost while in the possession of the debtor, it is assumed that the loss occurred through his fault and not accidentally, unless the contrary is proved, but without prejudice to the provision in art. 1096.”),<sup>170</sup> there is also a basis in legislation.<sup>171</sup> At least a part of the legal literature does not believe that the generalization of this exceptional rule (impossibility of the return of a particular object) is possible, though.<sup>172</sup> As grounds for the reversal of the burden of proof it is maintained that the limits of the liability of the debtor are only reached with the appearance of a “coincidental” impossibility.<sup>173</sup> The term of the coincidence is defined in art. 1105 CC: “Besides those cases

<sup>165</sup> The tort law merely contains in art. 1903 CC advice on the care of a good *pater familias*. The *Tribunal Supremo* filled in this hole, however, a long time ago with the use of the *culpa*-term in art. 1104 CC, see T.S. 19th February 1983, RAJ 1993 (1) p. 464, no. 561, T.S. 9th July 1969, RAJ 1969 (2) p. 2275, no. 3353 and T.S. 23rd December 1952, RAJ 1952, p. 1871, no. 2673.

<sup>166</sup> Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial*. Vol. II: Las relaciones obligatorias<sup>4</sup> (1993) 577.

<sup>167</sup> Cavanillas Múgica and Tapia Fernández loc.cit. 29.

<sup>168</sup> Cavanillas Múgica and Tapia Fernández loc.cit.

<sup>169</sup> T.S. 23rd February 1989, RAJ 1989 (1) p. 1492, no. 1395 and T.S. 23rd October 1990, RAJ 1990 (7) p. 10319, no. 8038.

<sup>170</sup> Cavanillas Múgica and Tapia Fernández loc.cit. 23.

<sup>171</sup> Cavanillas Múgica and Tapia Fernández loc.cit. 24, Lacruz Berdejo, *Elementos de Derecho Civil*, part. II: Derecho de Obligaciones, 1. vol.: Parte General. Teoría General del Contrato. (1999, new edition) 174.

<sup>172</sup> Díez-Picazo, loc.cit. 606.

which are explicitly mentioned by law, as well as those in which it is determined by the obligation, no person is liable for such events which could not be foreseen or which were foreseen, but were inevitable.” The *Tribunal Supremo* fundamentally differentiates between duties of care and duties as to result (*obligaciones de medios o de diligencia* bzw. *obligaciones de resultado*). In the first the obligee has to prove the *culpa* of the debtor.<sup>174</sup> Typical cases come from the area of the liability of doctors, for which however, contract and tort law are regularly not even differentiated.<sup>175</sup> A reversal of the burden of proof only comes into question – on both sides of the liability – if the failure in treatment in regular circumstances was not expected.<sup>176</sup> The liability for employees is also strict in contract law, although the general principle of strict liability for assistants is found in tort law (art. 1903 CC).<sup>177</sup> Contract law at least provides a few special rules, for example art. 1564 CC (the liability of tenants for property damage which has been caused by a member of the household), art. 1596 CC (the liability of an industrial employer for assistants), art. 1721 CC (the liability of a contractor for representatives) and art. 1784 CC (the liability of a pub landlord for employees). In contrast to tort law, independent subcontractors are liable in contract law.<sup>178</sup> Furthermore the liability in the following articles is strict: art. 1784 CC (the liability of pub landlords for property damage caused by third parties), art. 1745 CC (the liability of a borrower for the loss of an object), art. 1096 (3) CC (the liability of the debtor for loss of property in a particular case) and art. 1602 CC (the liability of carriers).

**89. Portugal** In Portuguese contract law, liability is as a rule, fault-based. Following art. 798 CC a debtor who *culposamente* neglects to fulfil an obligation to the obligee for the damage caused thereby, is liable.<sup>179</sup> The burden of proof for non-fulfilment lies with the obligee.<sup>180</sup> In art. 799 (1) the proof falls to the debtor, that the non-performance or unsatisfactory fulfilment of the duty is not based on his fault.<sup>181</sup> A presumption of fault is found in art. 801 (1) CC (*impossibilidade culposa*), which treats culpable incapacity to perform equally with culpable non-performance (art. 798).<sup>182</sup> In respect of the term *culpa* art. 799 (2) CC refers to tort law, for which art. 487 (2) CC, on the other hand, demands the “care of a good family father considering the individual circumstance”. This *culpa in*

<sup>173</sup> *Díez-Picazo*, loc.cit. 607.

<sup>174</sup> T.S. 15th March 1993, RAJ 1993 (2) p. 2946, no. 2276.

<sup>175</sup> Argued in tort law for example T.S. 15th November 1993, RAJ 1993 (5) no. 9096.

<sup>176</sup> T.S. 18th February 1997, RAJ 1997 (1) p. 1937, no. 1240 and T.S. 2nd Dezember 1996, RAJ 1996 (5) p. 12410, no. 8938.

<sup>177</sup> *Díez-Picazo* loc.cit. 592; *Cavanillas Múgica and Tapia Fernández* loc.cit. 31; *Lacruz Berdejo* loc.cit. 174.

<sup>178</sup> *Cavanillas Múgica and Tapia Fernández* loc.cit. 31.

<sup>179</sup> See on this STJ 9th June 1991, BolMinJus 409 (1991) 759 (concerning the voidness of a contract clause, through which this rule should be contracted away).

<sup>180</sup> *Antunes Varela*, *Obrigações em Geral* II<sup>7</sup> 101.

<sup>181</sup> *Freitas Rangel*, *O ónus da prova no processo civil*<sup>2</sup> (2002) 165-167.

<sup>182</sup> *Pires de Lima and Antunes Varela*, *Código Civil Anotado* II<sup>3</sup>, p. 59, note 1 under art. 801.

abstracto<sup>183</sup> is only assumed in contract law, and not tort law. An objectivisation assumed from this of contractual liability, can come to light from specific rules or from the agreement of the parties (*obrigações de garantia*).<sup>184</sup> Under the legal rules, the following are named: art. 800 (the liability for legal agents and accessories), art. 807 (strict liability during the debtor's delay), art. 899 (the liability of sellers in respect of a buyer in good faith for deficiencies in title); art. 909 (the liability of sellers after avoidance for mistake by the purchaser), art. 921 (1) (the liability of sellers for the assumption of a guarantee). In the remaining areas in Portugal there is a differentiation between the so-called *obrigações de meios*, *obrigações de resultado* and the *obrigações de garantia*.<sup>185</sup> With the *obrigações de garantia* the debtor takes on the risk of the non-performance of an obligation and is liable, therefore, independent of fault.<sup>186</sup>

**90. The Netherlands** In Dutch law the liability for compensation due to non-performance (*wanprestatie*) requires under art. 6:74 ff. BW next to non-performance or insufficient fulfilment, accountability (*toerekenbaarheid*). Causation between the breach of the duty and the damage is always required. If the breach of duty is not accountable (*overmacht*), at most a claim of unjust enrichment can come into the equation (art. 6:78 BW). The burden of proof for the (lacking) accountability principally lies with the debtor.<sup>187</sup> In the relationship to the consumer this distribution of the burden of proof is not to be contracted away through general conditions of business (art. 6:236 BW). As to the details, case law has developed an extensive and not easily penetrated casuistry. Non-performance will principally not be ascribed to the debtor, if the performance is objectively impossible, if this impossibility is not the fault of the debtor's and the risk of chance is not the responsibility of the debtor (arts. 6:74 (1) and 6:75 (3) BW). What is deemed to be the responsibility of the debtor in terms of areas of risk, is decided using laws, the contract and the communication between parties.<sup>188</sup> The debtor is statutorily responsible for accessories in performance (*hulpverleners*) after arts. 6:76 and 6:77 BW. In as far as contract law is concerned, employees and self-supporting subcontractors are not differentiated; this distinction is only important for redress within an employment relationship (art. 7:661 BW). Art. 6:248 (2) BW (good faith principle) is applicable to all contracts which can, in a specific case, stand in the way of liability.<sup>189</sup> Strict liability principally exists for the malfunctioning of goods which the debtor uses to fulfil his obligations (art. 6:77 BW). In tort law this is mirrored by the already mentioned art. 6:173 BW. Strict liability for impossibility of performance exists in the case of a delay (art. 6:84 BW). An example of the third ground for accountability (*verkeersopvatting*) is provided by the theft of a car rented for a short period of time. This risk should lie with the professional car rental agency.<sup>190</sup>

<sup>183</sup> Antunes Varela loc.cit. 100.

<sup>184</sup> Almeida Costa, *Obrigações*<sup>9</sup> 560 fn. 2 and 80 fn. 1.

<sup>185</sup> Almeida Costa loc.cit. 971-972; Antunes Varela loc.cit. 101.

<sup>186</sup> Almeida Costa loc.cit. 972.

<sup>187</sup> Parlemenaire Geschiedenis 6, p. 264.

<sup>188</sup> Further on this and below Asser-Hartkamp, *Verbintenissenrecht* 4 (I)<sup>11</sup> (2000) 317 ff.

<sup>189</sup> For an example from the case law see H.R. 21st May 1999, RvdW 1999, 80.6:77.

<sup>190</sup> H.R. 24 October 1997, NJ 1998, 69 (*Spruijt/Tigchelaar Autoverhuur*).

91. **Germany** In German law contractual compensation claims have their basis either in general law of the impairment of performance of an obligation or in the guarantee measures – regulated with the individual types of contract. §§ 275 ff. BGB contain the basic rules of the general law of the impairment of the performance of an obligation. They are applicable for all obligation relationships and are extended for particular types of obligation relationships through further regulations in different areas of the general law of obligations (for example §§ 323 ff. BGB for all two-sided contracts) and in the law of the respective individual contracts (for example §§ 434 ff. for sales contracts). The central basis for liability in damages is § 280 (1) BGB since the coming into force of the law modernising the law of obligations,<sup>191</sup> which is geared towards a breach of an obligation. Following this provision, the obligee can demand compensation for damage arising in a case where the debtor breaches a duty in the obligation relationship. According to § 280 (1) sentence 2 BGB this does not apply if the debtor was not responsible for the breach of the duty. § 276 (1) sentence 1 BGB determines the basic decision in this context for the principle of fault, because the debtor following this, is principally only responsible for intention and negligence. General impairment of performance of an obligation law follows in theory the principle of fault, where there is, however, a reversal of the burden of proof favouring the injured party (as comes to light from the wording of § 280 (1) sentence 2 BGB). This reversal of the burden of proof does not apply, however, to the liability of an employee. § 619 a BGB<sup>192</sup> determines that differing from § 280 (1) BGB an employee only has to compensate an employer for damage resulting from the breach of a duty in the working relationship, if he was responsible for the breach of duty. § 276 (1) sentence 1 BGB clearly states, that another standard of liability can also be inferred from the content of the obligation, in particular from the assumption of a guarantee or a risk of obtaining. The type of obligation can also play a role in the liability-modifying contents of the obligation relationship in § 276 (1) sentence 1 BGB.<sup>193</sup> If the debtor can not fulfil a pecuniary obligation due to financial incapability, he is responsible for the non-performance, independent of fault.<sup>194</sup> The related term in § 280 BGB of breach of duty, embraces performance duties, secondary performance duties and duties of care.<sup>195</sup> The breach of duty to be covered by the debtor forms the basis of a claim for compensation for the other party (§§ 280 (1) sentence 1, 249 ff.). It is principally focused on the compensating of positive interest and does not step into the territory of, but rather exists next to, a claim of primary (or specific) contractual performance. The claim stretches over all direct and indirect disadvantages of the defect which causes

<sup>191</sup> BGBl. I 2001, p. 3138 ff.

<sup>192</sup> Introduced into the BGB with the adoption of the case law of the Federal Employment Court (BAG), compare with the report of the Parliament's legal affair's committee, BT-Drucks. 14/7052, p. 204, with further references.

<sup>193</sup> Palandt-Heinrichs, BGB<sup>62</sup> (2003) § 276, no. 27.

<sup>194</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 276, no. 28; *Medicus*, Schuldrecht I AT<sup>13</sup>, no. 351 ff.; *Lorenz/Riehm*, Lehrbuch zum neuen Schuldrecht, no. 177; *MünchKomm-Grundmann*, BGB<sup>4</sup>, § 276, no. 180; *Staudinger-Löwisch*, BGB (Neubearbeitung 2001), § 279, no. 2; compare on this topic in the area of legislative procedure on the modernisation of the law of obligations, also the recommended resolution of the law commission, BT-Drucks. 14/7052, p. 183 f.

<sup>195</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 280, no. 12.

damage and also covers trial costs; consequential damage which lies outside the protective purpose of the breached duty, is excepted.<sup>196</sup> If one of the objects of legal protection named in § 253 (2) BGB is breached, the obligee can demand compensation for pain and suffering along with compensation for material damage. It is to be noted where there is unsatisfactory fulfilment that there is in certain circumstances legal redress of prime importance for the obligee in the law of obligations, for instance in law on sales and law on contract for services. §§ 437 no. 3 and 634 no. 4 BGB refer, due to the claim for compensation for a defect in quality and defect in title, again to §§ 280, 281, 283 and 311a BGB, where the reference is applicable for damage caused by a defect as well as consequential damage caused by a defect.<sup>197</sup> For compensation due to a delay in performance (compare §§ 280 (2), 286 BGB; cumulative to the fulfilment claim) as well as “compensation instead of performance” (alternative to a fulfilment claim) the law in §§ 281 ff. BGB and particularly § 280 (1) BGB establishes broadened requisites. Here particular rules for delayed or lacking performance are found (§ 281 BGB), along with the breach of a collateral obligation (§ 282 BGB) as well as compensation for the case of impossibility (§§ 283, 311a (2) BGB). In accordance with § 284 BGB the obligee can demand compensation for his frustrated outlay, which was spent whilst relying on the performance, in place of compensation instead of performance. If the duty of primary performance is excluded following § 275 BGB, the obligee can demand the “acting substitute” following § 285 BGB, this being indeed independent of an obligation which the debtor is responsible for.<sup>198</sup>

92. **Sweden** As in Swedish tort law, the culpa rule fundamentally dominates Swedish contractual compensation liability.<sup>199</sup> One of its most important fields of application is the liability for so-called “non-material” services. Exceptions from the general rule can be contractually arranged (the Liability Act can in principle be contracted away)<sup>200</sup> or be statutorily prescribed or be produced from the general principles of contractual compensation law, which are interpreted as *leges specialis* in the relationship to compensation statutes and normally achieve an objectivisation of the liability.<sup>201</sup> In accordance with chap. 4 §§ 13 ff land law statute [*jordabalk* (1970:994)] a seller of land, for example, who runs into delay with the duty of transfer or with the duty of assisting in the drawing up of the necessary deeds, is subject to strict liability for compensation.<sup>202</sup> Comparable provisions about a so-called “control liability” for the “direct” loss (so-called “indirect” losses remain in negligence liability), are found in § 27 sales law [*köplag* (1990:931)], in § 14 consumer sales law [*konsumentköplag* (1990:932)]; in § 31 consumer services law [*konsumenttjänstlag* (1985:716)]; in § 14 (2) no. 2 travel law [*lag* (1992:1672)]

<sup>196</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 280, no. 32.

<sup>197</sup> Palandt-Heinrichs, BGB<sup>62</sup>, Introduction to § 275, no. 17.

<sup>198</sup> Medicus, Bürgerliches Recht<sup>19</sup>, no. 243.

<sup>199</sup> Hellner, Speciell avtalsrätt vol. II. Kontraktsrätt. 2. Halvband. Allmänna ämnen<sup>3</sup> (1996) 195.

<sup>200</sup> Hellner and Johansson, Skadeståndsrätt<sup>6</sup> (2000) 85; Bengtsson and Strömbäck, Skadeståndslagen. En kommentar (2002) 19, 33 f.

<sup>201</sup> Hellner and Johansson loc.cit. 87 f; Bengtsson and Strömbäck loc.cit. 34-35.

<sup>202</sup> Hellner, Jan, Speciell avtalsrätt Part II. Kontraktsrätt. Vol.2 Särskilda avtal<sup>2</sup> (1993) 48.

om paketresor] and in chap. 14 § 49 (3) sea law [sjölag (1994:1009)]. These provisions, however, shall not be applicable to contracts for services or manufacture between traders.<sup>203</sup> In a few areas of contractual compensation liability, a rebuttable presumption of fault is used (*presumtionsansvar*). Statutory examples are found in freight contract law (§ 28 of the law on national road transport [lag (1974:610) om inrikes vägtransport], in the law on renting movable objects where there is a delay in the handing over of the object,<sup>204</sup> in § 34 trade agency law [lag (1991:351) om handelsagentur] and in § 32 (1) consumer service law (liability for damage of consumer's property which is contractually in the possession of a trader). An example from the case law concerns a bailee in respect of objects given or handed over into his care.<sup>205</sup> Principally the liability is strict however, for the punctual performance of pecuniary obligations (§ 57 (1) sales law; § 7 (2) 3 law of debtor's bonds [lag (1936:81) om skuldebrev]; § 41 (3) consumer sales law); chap 4 § 25 (2) Real Property Act; § 48 consumer service law (though with a different type of calculation of damage)<sup>206</sup>). The liability for defects in title is also strict in relation to a purchaser in good faith (§ 41 (2) sales law and chap. 4 § 21 Real Property Act).

93. **United Kingdom** English law and Scots law both approach the question of the conceptual basis of liability for breach of contract in the way adopted by PECL art. 8:108 (2), as detailed above at para 82. Contract law does not concern itself with whether it is or is not underpinned by either a general principle of fault or a general principle of strict liability. The question is in all cases, what was agreed by the parties, expressly or impliedly, and amongst what is impliedly agreed are certain specific obligations that are incorporated into agreements of particular types, that particular legal provisions state as being implied. This reflects in English law the understanding of contract as a bargain, in which consideration is given for the other parties' obligations. In Scots law it reflects the understanding of contract as a set of mutual obligations. Courts, accordingly, do not attempt to formulate a general theory to define "breach of contract", and text writers give such generalised definitions as "a failure to comply with the express or implied terms of the contract".<sup>207</sup> In so far as the specific question of whether liability is strict or based on fault is considered as such at all, the approach is simply in response to that question to list examples of where the agreement is seen as involving strict liability in respect of certain of the agreed obligations and where it is seen as involving liability on some other basis in respect of certain of the agreed obligations.<sup>208</sup> Many central obligations are strict, as for instance the obligation to pay the price of goods, or perform an obligation at a particular date undertaken, and so on. Notwithstanding this, however, whether an obligation in a

<sup>203</sup> Hellner, *Speciell avtalsrätt Part II. Kontraktsrätt. Vol. 2. Allmänna ämnen*<sup>3</sup> (1996) 198.

<sup>204</sup> Hellner, *Speciell avtalsrätt Part II. Kontraktsrätt. Vol. 1. Särskilda avtal*<sup>2</sup> (1993) 185.

<sup>205</sup> See on this in-depth HD 29th September 1983, NJA 1983, 617 and HD 26th April 1989, NJA 1989, 191.

<sup>206</sup> Hellner *loc.cit.* 116.

<sup>207</sup> McBryde, *The Law of Contract in Scotland* (3rd ed) (2001) para 22-07 – The author notes that there are inevitable problems of analysis from this approach.

<sup>208</sup> Treitel, *The Law of Contract* (9th ed) (1995) 751-755; J. Beatson, *Anson's Law of Contract* (27th ed) 475: "Sometimes the standard will be strict ... Sometimes it will only require the exercise of reasonable care or due diligence".

particular contract is or is not strict or the extent to which it is or is not strict is, nonetheless, not seen as springing from any general principle of contract law. Today many of the legal provisions that lay down particular obligations as being implied, result from conscious modern statutory regulation for particular contracts. Notable amongst these is that in contracts for the sale<sup>209</sup> and also other contracts for the supply of goods, such as hire purchase<sup>210</sup> by a commercial party the term implied, thus, by statute, that the goods are of satisfactory quality results in an obligation that is strict. The law in some contracts, by contrast, implies terms relating to performance which mean that the position is that the obligation is one to exercise reasonable skill or reasonable care, as in contracts for the supply of services alone, where the statute reflects what was previously the common law,<sup>211</sup> or as in contracts for the carriage of goods by sea,<sup>212</sup> where the statute alters an earlier common law rule that liability for loss or damage to goods through unseaworthiness was strict. Whether an obligation is strict or not strict it can be altered or modified by agreement of the parties. For instance sometimes architects, as in the typical “design/build” contract,<sup>213</sup> expressly contract with clients for the design of a building, on the basis that it will be fit for the client’s purposes, or otherwise meet a client’s specific requirements,<sup>214</sup> whereas normally the design obligation is to exercise reasonable professional care. In situations where the law implies terms, those terms can only be altered or modified so long as the statutory law governing the control of unfair terms<sup>215</sup> does not prohibit this (see para 240, below) – which in effect considerably controls, at least in the case of consumer contracts the possibility of reducing the standard from strict liability. The burden of proof with respect to breach having occurred, and in those cases where the remedy sought is damages for loss, the burden of proof that the contract has been breached and loss having arisen, is on the party who is the creditor in respect of the obligation allegedly breached. Where the breach takes the form and in a context, where liability could, if established, be based alternatively on tort/delict as ordinary negligence, as in a case of injury to an employee through the personal negligence of his employer, the establishment of certain fact patterns which indicate negligence unless and so giving rise to a shift in the “tactical burden of proof”, such as cases of *res ipsa loquitur*, unless evidence is then led by the other party to remove that natural inference would apply equally if the case were to be pled on the basis of breach of contract. However, the background of professional expertise in cases of professional negligence in effect means that these fact patterns will not arise in many cases of breach of contract, where the standard of performance is the reasonable skill of a professional.<sup>216</sup> The burden of proof that breach of contract has caused a loss is, likewise, on the party

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<sup>209</sup> Sale of Goods Act 1979 as amended by the Sale and Supply of Goods Act 1994.

<sup>210</sup> Supply of Goods and Services Act 1982.

<sup>211</sup> Supply of Goods and Services Act 1982.

<sup>212</sup> Carriage of Goods by Sea Act 1971 section 3.

<sup>213</sup> *Greaves & Co Contractors Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99.

<sup>214</sup> *Christopher Moran Holding Ltd v Carden & Godfrey* (1999) 73 Con L R 28.

<sup>215</sup> Unfair Terms Act 1977; Unfair Terms in Consumer Contracts Regulations 1999.

<sup>216</sup> The consideration of this has been largely in cases of medical negligence, where the doctrine of *res ipsa loquitur* has been found to have little or no function (*I Kennedy and A Grubb*, *Medical Law* (3<sup>rd</sup> ed) (2000) 456-465.

who is the debtor in the obligation that is breached. An exception is in cases where the alleged loss caused by the breach of contract takes the form of failed expenditure by the innocent party, for instance expenditure in carrying out work in making a television programme that in breach the other party then never transmitted.<sup>217</sup> The law rebuttably presumes that expenditure made by a party in connection with their business will be lost with the breach of contract being seen as its cause, and the burden is on the debtor in the obligation breached to show that it was not.<sup>218</sup> It is extremely unlikely that that negative burden will be discharged. Where it is the debtor in the obligation that is breached he has to show that the reliance interest is limited by the expectation interest.<sup>219</sup> It has been suggested that it is an open question in Scotland whether this can ever be done.<sup>220</sup> The legally valid excuses for non-performance are where the contract is “frustrated” after it is concluded through practical impossibility, or legal impossibility, or removing its commercial purpose. The burden of proof is on the party seeking to show that this has happened. The same burden would apply where the excuse takes the form of an allegation that the other party has so obstructed the performance of the contract that the non-performing party should not be held responsible.<sup>221</sup>

## (2.) Damages for Economic Loss

94. **Overview** If the particular problem of so-called “pure economic loss” is disregarded for a moment, then economic losses naturally constitute compensatable damage. They are principally determined by the balance method, that is to say on the basis of a comparison between the current financial circumstances of the injured party, and those in which he would have found himself without the loss-inducing event. In contract law that is in principle the situation, which would occur with the correct performance (so-called “positive” interest), in tort law the situation, which would have continued without the damaging event (so-called “negative” interest). Nevertheless in the following text the questions of whether the legal systems of the member states in respect of the amount of the compensatable damage and the requisites for the compensation of individual particular quantities of damage (like lost profit) display considerable differences, will be investigated. Even this, however, will be split for examination into tort and contract law; it may also repeatedly be the case, however, that the differences between these two areas of the law of obligations turn out in some (but not in all) jurisdictions to be relatively small.

Differences in the extent of liability can alter the financial burdens of businesses which are obliged to render the same performance, depending on the applicable

<sup>217</sup> *Anglia Television v Reed* [1972] 1 Q.B. 60 (CA).

<sup>218</sup> *Commonwealth of Australia v Ammann Aviation Pty Ltd* (19991) 66 ALJR 123.

<sup>219</sup> Though for an example see *C & P Haulage v Middleton* [1983] 1 W.L.R. 1461 (CA), where rent paid would have to have been paid in any event.

<sup>220</sup> *Fielding v Newell* 1987 SLT 530 is cited in *MacQueen and Thomson*, *Contract Law in Scotland* (2000) para 6.26 as authority indicating it might not be possible.

<sup>221</sup> *McBryde*, *op cit* 20-16.

law. Where, for example, a carrier in the border area between two countries is under an obligation to carry passengers and luggage, and causes an accident in which damage occurs to some valuable item belonging to one of the passengers, liability to compensate that loss in country A may be purely a matter of contract law, while in country B it might be characterised as both within contract law and within the law of tort, according to whether the country applies the principle of *cumul des responsabilités* or the principle of *non-cumul des responsabilités* (see below at sections 279 ff). Should both countries provide that under contract law only foreseeable damage is required to be compensated, but under the law of tort in principle all damage is compensatable, then the same accident burdens the carrier to a manifestly greater extent under the law of country B. That is so, for example, because he is liable to compensate the passenger for the consequences of the fact that the passenger was not able to sell goods being transported at an auction at the place of destination at the particularly high price that had been anticipated. Comparable inequalities in the legal position could arise in connection with the liability of hospitals to their patients. Where this liability (as for instance in Italy, cf Cass. 22<sup>nd</sup> January 1999 n. 589, Foro it. 1999, I, 3332) is conceived as exclusively a matter of contract law, its extent is limited to foreseeable losses. Where, by contrast, it is seen as founded on the law of tort (as in Germany), this limit is not applied. Patients, therefore, find themselves in a position that is discernably worse under Italian law than under German law.

The responses to our second questionnaire which we received do not go into detail into the problem of different extents of liability. In many cases obstacles to the internal market are denied without further elaboration. A response from an addressee engaged in legal practice spoke of an aggravation in the form of mandatory extra-contractual liability and in that regard pointed to insurance protection as a corrective. This was in essence the same picture which emerged from the responses to our first questionnaire (see Part V below).

**95. Economic and non-economic damage distinguished** All legal systems of the European Union differentiate between differing categories of damage even if in detail they do not use identical criteria. This study is based on the differentiation between economic and non-economic damage. This appears tenable because it reflects the most frequently come across distinctions in Europe, and because it mirrors at least in approach the customary differentiation between special and general damages in common law. Special damages allow for the amount to be verified, general damages can not be proved in terms of the sum, and therefore have to be set by the judge. The distinction between economic and non-economic (“damage to feelings”) damage often causes the continental European legal systems considerable problems, though. This can not be gone into in greater depth here. One could think of, for example, cases in which someone is impeded from going to a concert, for which he has already bought tickets, of the loss of objects in which the owner has a particular personal interest, or of spoiling someone’s enjoyment of their land by noise or a smell.

## (a) Tort law

96. **Belgium, France, Luxembourg** In the French, Belgian and Luxembourgian legal systems, the principle applies that tortious liability for compensation requires the existence of damage.<sup>222</sup> Tortious liability is aimed at compensation, not punishment or deterrence.<sup>223</sup> It is to be noted though, that there are exceptions to this principle, and indeed in particular where the courts assume the presence of damage due to the existence of a certain *faute*. And so it is, for example, in the law of *concurrency déloyale* (which represents a specific shaping of the general tort law). In order to avoid an *action en concurrence déloyale* running aground because of the lack of a concrete loss, the French courts have often only requested little proof of damage.<sup>224</sup>

That is clearly demonstrated from Cass.com of the 9th February 1993.<sup>225</sup> A manufacturer of lorries brought proceedings against an authorized repair shop, because despite the termination of their licence they still posed as the manufacturer's authorized dealer. The *Cour de Cassation* stated in contrast to the appeal court, that the established *actes déloyaux* of the dealer necessarily had to mean *l'existence d'un préjudice pour la société MBF, fût-il seulement moral*.

In the French legal system it is normally stressed that damage in the sense of tort law is only present when it is direct and certain (*direct et certain*), whereby the element of certainty of damage in today's view includes the earlier separately examined "relevance to the current situation" of damage.<sup>226</sup> Damage, though, can already be "certain" at a point in time, which has not yet taken place. Future damage is *certain*, when there are cogent grounds for the assumption that it will take place.<sup>227</sup> The requirement of the directness of the damage is interpreted by many authors, though, as a part of the problem of causation.<sup>228</sup> In contrast to contract law, in tort law there is no differentiation between foreseeable and non-foreseeable damage (*dommage prévisible* or *imprévisible*).<sup>229</sup> It is only

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<sup>222</sup> Viney and Jourdain, Les conditions de la responsabilité<sup>2</sup>, no. 247 p. 3; Dirix, Het begrip schade, no. 1 p. 13; Ravarani, La responsabilité civile, no. 691 p. 487.

<sup>223</sup> Viney loc.cit. no. 67 ff. p. 111 ff.

<sup>224</sup> Viney and Jourdain loc.cit. no. 247 p. 4.

<sup>225</sup> Bull. Civ. 1993, IV, N° 53 p. 34; JCP 1994 éd. E, II, 545, note Danglehant.

<sup>226</sup> Flour/Aubert/Savaux, Le fait juridique<sup>9</sup>, no. 136 pp. 124-125.

<sup>227</sup> The fundamental on this: Cass.req. 01.06.1932, p. 1933, I, 49, note H. Mazeaud : « (...) s'il n'est pas possible d'allouer des dommages-intérêts en réparation d'un préjudice purement éventuel, il en est autrement lorsque le préjudice, bien que futur, apparaît aux juges de fait comme la prolongation certaine et directe d'un état de choses actuel et comme étant susceptible d'estimation immédiate (...) ».

<sup>228</sup> Flour/Aubert/Savaux loc.cit. no. 136 pp. 124-125; Malaurie and Aynès, Responsabilité délictuelle<sup>11</sup>, no. 241 p. 138.

<sup>229</sup> Malaurie/Aynès loc.cit.

necessary that the damage has a *caractère légitime* (compare also art. 31 NCPC<sup>230</sup>),<sup>231</sup> a requirement which in the meantime loses its practical relevance.<sup>232</sup> In Belgium, fundamentally the same criteria apply. A difference between foreseeable and non-foreseeable damage is also not made in Belgian tort law: The total damage is to be compensated for, and this not only if its extent was foreseeable.<sup>233</sup> This does not contradict the fact that a breach of an *obligation générale de prudence* only then represents a *faute*, if the damage as such was foreseeable.<sup>234</sup>

97. **Italy** For the purposes of tort law the assessment of pecuniary loss is regulated by art. 2056 of the Italian CC. It refers to compensation for the non-performance of obligations concerning arts. 1223, 1226 and 1227 CC. Accordingly loss suffered and profit missed out on are to be compensated for, as long as these items are the immediate and direct consequence of the damage-inducing event (art. 1223 CC). Profit missed out on is valued by the court after just weighing up of the circumstances in the individual case (art. 2056 (2) CC). If the damage can not be proved in its exact amount, it is determined by the court based on equity (art. 1226 CC). However, art. 1225 CC is not applicable in tort law. The provision determines that the compensation is to be limited to the damage which – in the case of unintentional non-performance – could have been foreseen at the point in time of the creation of the obligation. It is therefore assumed that the unforeseen damage must be compensated for in tort law.<sup>235</sup> This principle is not applicable without limits, though.<sup>236</sup> Art. 2057 CC determines that in the case of damage to a person of a lasting sort, the court can with consideration of the situation of the parties and the type of damage, set the compensation in the form of an income. In the case of damage to property the court can order that the compensation is made by the payment of the worth of the object, if the reproduction of the object is too much of a burden for the debtor.

98. **Austria, Germany and Sweden** As in the previously mentioned Romance systems, the German and Austrian legal systems do not recognize a rule in tort law, in which only foreseeable damage is to be compensated. Such a rule also does not exist in these

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<sup>230</sup> “An action shall lie to all persons having a legitimate interest in the success or the dismissal of a claim save where the law shall confer *locus standi* only to those persons allowed to bring or contest a claim or to defend a specific interest” (translation by *Légifrance* and *Grivart de Kerstrat*, available online under: [http://www.legifrance.gouv.fr/html/codes\\_traduits/ncpca\\_text.htm](http://www.legifrance.gouv.fr/html/codes_traduits/ncpca_text.htm)).

<sup>231</sup> *Terré/Simler/Lequette*, *Les obligations*<sup>8</sup>, nos. 704-706 pp. 684-686.

<sup>232</sup> *Viney and Jourdain* loc.cit. nos. 271-273 pp. 59-62.

<sup>233</sup> *Ronse [a. o.]*, *Schade en schadeloosstelling I*<sup>2</sup>, no. 225 pp. 169-170.

<sup>234</sup> *Further Dalcq and Schamps*, *Examen de jurisprudence* (1987 à 1993). *La responsabilité délictuelle et quasi délictuelle*, RCJB 1995 (pp. 525-638), no. 6 pp. 536-537.

<sup>235</sup> This had already been envisaged by *Relazione al codice*, no. 801: the suggestion that the extent of recoverable tortious damage should depend upon the degree of fault was rejected.

<sup>236</sup> In-depth *Pinori*, *Il criterio della prevedibilità del danno contrattuale*, in *Il risarcimento del danno contrattuale ed extracontrattuale a cura di Visintini* (1999) 132-134.

countries for contract law.<sup>237</sup> In tort law the delimitation of liability is developed through the so-called doctrine of adequacy. Following this, principally only the consequences of the damaging act which are not outside the realm of possibility, are to be compensated. The Swedish Liability Act regulates the calculation of damage in its fifth chapter. Damage to property is to be compensated in accordance with § 7 (no. 1) by the value of the object or the amount of repair costs plus the diminution in value. Furthermore, things to be compensated for following no. 2 loc.cit are “other costs” which are a consequence of the damage,<sup>238</sup> and following no. 3 loc.cit. losses in income and interference with a business enterprise. Generally only negative interest is compensatable. In tort law it does not depend upon the foreseeability of the extent of damage.<sup>239</sup> The tortfeasor has to carry the risks and the costs for the regaining of the *status quo ante*.<sup>240</sup>

**99. Portugal** Following art. 564 (1) of the Portuguese CC the duty to compensate includes the lost suffered as well as lost profit. Art. 563 CC requires a causal connection in the sense of the idea of adequate causation for the duty to compensate. Following art. 562 the recreation of the original circumstances has priority over monetary compensation. Compensation is monetary following art. 566 (1), when compensation for damage in kind is not possible, it does not completely eliminate the damage or the debtor is excessively burdened. These rules apply for tort law as well as contract law. That also applies for art. 564 (2) CC, whereby “the courts while determining the damage can consider future damage, as far as it is foreseeable; if it is not foreseeable, the determination of the corresponding damages is reserved for a later decision.”<sup>241</sup> Following art. 567 (2) CC (concerning compensation in the form of periodic payments) each of the parties can demand a change to the judgment if circumstances have changed considerably. Ceiling limits on liability only exist in the framework of strict liability (art. 508 CC (traffic accidents) and art. 510 CC (damage caused by electric and gas fittings)).

**100. The Netherlands** Art. 6:98 BW, which is applicable to tort law as well as contract law, tries to combine these two approaches from the Romance and Germanic legal

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<sup>237</sup> Koziol, *Haftpflichtrecht* I<sup>3</sup> (1997) nr. 8/54, p. 267, with a comparison to art. 74 (second sentence) CISG.

<sup>238</sup> Examples: HD 6th May 1994, NJA 1994, 283 (claim against a thief for the compensation of a finder’s reward paid to a third party by the owner); HD 19th December 1994, NJA 1994, 709 (investigation costs of an insurer for the uncovering of attempted insurance fraud; compensatable pure economic loss as a consequence of a criminal act);

<sup>239</sup> HD 18 October 1957, NJA 1957, 499 (inadvertent killing of a very valuable dog on a fox hunt; the particular value of the dog was not recognizable by the hunter); HD 12 April 1978, NJA 1978, 207 (extremely long time for the repair of a vehicle with corresponding high costs for the hire vehicle, caused by the necessary negotiations of the injured party with the producer due to the guarantee of the vehicle); HD 29 October 1991, NJA 1991, 567 (no contributory negligence because the dog killed was not insured).

<sup>240</sup> Andersson, *Skyddsändamål och adekvans* (1993) 532.

<sup>241</sup> Further STJ 24th February 1999, BolMinJus 484 (1999) 359 and STJ 5th November 1974, RLJ 108 (1975-76) 311 (note *Vaz Serra*).

families. The provision concerns the *causaal verband* between the event giving rise to liability and the damage and expresses the proposition that only a loss which has an attributable connection to the event giving rise to liability is reparable. In this respect one has to look to the contents of the breached legal norm of conduct, the type of damage suffered, the type of liability and the criteria of foreseeability. The protective purpose of the breached legal norm can, in particular circumstances, decrease or increase the requirement of foreseeability.<sup>242</sup>

**101. England and Wales** Within the United Kingdom, English law and Scots law respond to certain aspects of these questions in distinct ways. English tort law distinguishes between those torts where harm must be proved, and those where it is not required to be. The former group of torts, which includes negligence is however, of the greater practical significance. The prominent instances within the latter group of torts “actionable *per se*” are trespass to movable or immovable property and defamation. The absence of a requirement to prove harm in the former springs from the essential feature of the tort, the intentional physical invasion of property in which the plaintiff happens to have a possessory interest,<sup>243</sup> whether knowing of the plaintiff’s interest or not, rather than the intentional harming of that property. In theory the same position obtains in a case of intentional invasion of another’s person. But today some further quality of the act is required in these cases,<sup>244</sup> and in the nature of things in such instances there will in any case be a claim in respect of damage done in the impact on the life of the plaintiff, whether in cases of physical injury or deprivation of liberty.<sup>245</sup> In cases of defamation, liability is strict and follows from where a defamatory representation of the plaintiff is published. Even though no impact on the life, feelings or reputation of the plaintiff is proved there will be liability to pay an artificial sum, which can be very small, as “nominal damages”. Where liability is based on a tort that does require proof of damage it is necessary as a precondition for damages to be awarded that that damage is sufficiently closely connected to the tortious conduct of the defendant. This requirement is variously considered under the headings of the requirement that the harm must not be too remote, must be “within the scope of the duty”, the conduct of the defendant must be a cause of sufficient importance, and the loss must not arise because of a failure of the defendant to take reasonable steps in response to the harm, once sustained to mitigate his loss.

**102. Scotland** Scots law does not recognise that any delict is actionable without proof of loss. This reflects the fundamental difference from English tort law in that the law of delict is not made up of discrete torts/delicts. Those bases of liability within the law of delict that have acquired specific names in Scots law, with two possible small exceptions, have all emerged within the law of relating to intention to harm as requiring different types of intention or intentional act and equally require proof of loss as is required in the

<sup>242</sup> H.R. 2nd November 1979, NJ 1980, 77; *Vader Vershuis*.

<sup>243</sup> *Dutton v Manchester Airport* [2000] Q.B. 133 (CA).

<sup>244</sup> What exactly this is remains controversial. E. g. in on physical assault case the Court of Appeal distinguished “hostile” acts from other acts (*Wilson v Pringle* [1987] Q.B. 237).

<sup>245</sup> See *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 A.C. 19.

rest of the law of delict. Notwithstanding the arguable examples that do not involve intention, liability for things dropping from a building onto people or property outside it<sup>246</sup> and liability for diverting a natural stream,<sup>247</sup> if they exist,<sup>248</sup> are instances of strict liability in Scottish common law, they, likewise, require proof of loss. So does defamation, and references in that context of “nominal damages” are to be seen rather as very, very small sums as *solatium* for hurt feelings.<sup>249</sup> With respect to the questions of mitigation, and causation the same approach is taken as in the English law of tort. Whether the approach to the test of remoteness is in every respect the same as in English law has been stated recently to be unresolved.<sup>250</sup> There may still be grounds for thinking, possibly, that the test where what is at issue is further items of physical damage following on from an item of physical damage for which the defender is liable, that a test of directness is applied rather than one of foreseeability.<sup>251</sup> However, it is clear, as in English law, that the general test is foreseeability, with the qualification that intentional harm is never too remote.<sup>252</sup> Moreover, the same approach is taken as in England to those cases such as professional advisers negligently advising lenders to the question of the relation of this to the “scope of the duty”.<sup>253</sup> In Scotland the extent of any “patrimonial loss” (i. e. economic losses, whether past or future) for which compensation is sought, must be specifically proved on evidence on the normal civil standard of proof of balance of probabilities. (This general requirement of specific proof of the extent of patrimonial loss, whether claimed as referring to the past or to the future, reflects the fact that the distinction in English law between “general damages” and “special damages” is unknown, even though the subset of English general damages awards for pain and suffering in personal injury cases which are equivalent to Scottish awards of *solatium* for non-patrimonial loss are

<sup>246</sup> Arguably derived from the *ius commune* understanding of the Roman *actio de effuses vel dejectis* – discussed *obiter* in *McDyer v Celtic Football and Athletic Club Ltd* 2000 S.C. 379 per Lord President Rodger.

<sup>247</sup> Allegedly supported by the Scots House of Lords case, *Caledonian Railway v Greenock Corporation* 1917 SC (HL) 56.

<sup>248</sup> The first is very doubtful despite *obiter dicta* to the contrary (*RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) per Lord Fraser of Tullybelton at 42), Niall R Whitty, 14 Stair Memorial Encyclopaedia; Nuisance (Reissue, 2001) para 91; Gordon Cameron, ‘Nuisance, Strict Liability and the rule in *Caledonian Railway Co v Greenock Corporation*’ (2000) 5 SLPQ 356.

<sup>249</sup> Some references to this area misleading (as Walker, *Civil Remedies* 993) See J W G Blackie in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland Vol 2- Obligations* (2000) at 661. The phrase is not used in the leading modern work, K McK Norrie, *Defamation and Related Actions in Scots Law* (1995).

<sup>250</sup> *Simmons v British Steel plc* 2003 SLT 62 per Lord Justice Clerk Gill at [21].

<sup>251</sup> The view found in Walker, *Delict* (2<sup>nd</sup> ed) (1981).

<sup>252</sup> There is little Scottish authority on this qualification, but see K McK Norrie, *op cit* 171 citing the English authority.

<sup>253</sup> *Newcastle Building Society v Paterson Robertson and Graham* [2001] Scot CS 66; 2002 SLT 747 per Lord Reed at [23] following the English House of Lords decisions, *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] A.C. 191 and *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No. 2)* [1997] 1 W.L.R. 1627.

referred to for guidance in that field, under that heading).<sup>254</sup> In applying the general rule of specific proof in appropriate situations, such as where there is liability in delict for a personal injury, which may, but currently does not, affect a person's future employment prospects, for instance, should he or she for some other reason in the future become unemployed the court is entitled to assess the matter broadly. There is also one partial exception to this general rule of specific proof reflecting similar realities, namely in cases of defamation, it is sufficient that it is proved that there is some loss and the judge, or jury assesses its financial impact in a general way considering the circumstances.<sup>255</sup>

## (b) Contract law

**103. General** As has been stated, the rules on the law of the extent of damage which has to be compensated for can be different in terms of contents in contract law from tort law. The most important difference, which is not found everywhere however, may lie in the answer to the question of whether in contract law only damage in the amount which was foreseeable is to be compensated. There are of course a few other aspects in addition.

**104. France and Belgium** In the French, Belgian and Luxembourgian legal systems, contractual liability requires damage on principle.<sup>256</sup> Although a few French legal scholars are inclined towards the view that the *inexécution contractuelle* as a rule implies the existence of damage,<sup>257</sup> the French *Cour de Cassation* appears to be holding on to the separation between *faute contractuelle* and *dommage*.<sup>258</sup> In French legal literature it is pointed out that the damage must be certain and direct (*certain et direct*), in which the requirement of *certitude* includes those of *actualité*.<sup>259</sup> Nonetheless future damage can also have a character which is *certain*, namely if the damage would arise with certitude from the current state of affairs and the judge can already calculate it.<sup>260</sup> The requirement of the direct character of the damage follows from art. 1151 CC. As long as the debtor has not acted deliberately, he is only duty-bound to compensate for the foreseeable damage in accordance with art. 1150 CC.<sup>261</sup> Following current Belgian legal literature in the area of contractual liability, all damage is compensatable which displays a certain, personal and "legitimate" character.<sup>262</sup> Future damage is compensatable if it is already certain.<sup>263</sup>

<sup>254</sup> *Heasman v J M Taylor and Partners* 2002 Scot CS 63.

<sup>255</sup> K McK Norrie, op cit 165-166.

<sup>256</sup> *Flour/Aubert/Flour/Savaux*, Le rapport d'obligation, no. 216 p. 139; *Malaurie and Aynès*, Contrats et quasi-contrats<sup>11</sup>, no. 574 p. 346; B.H. Verb. (-Claessens) II-4, no. 1749.

<sup>257</sup> *Carbonnier*, Les Obligations<sup>21</sup>, No. 155 p. 283.

<sup>258</sup> Cass. 18th November 1997, Bull. Civ. 1997, I, no. 317 p. 215: « (...) une faute contractuelle n'implique pas nécessairement par elle-même l'existence d'un dommage en relation de cause à effet avec cette faute. »

<sup>259</sup> *Flour/Aubert/Flour/Savaux* loc.cit. no. 217 p. 140.

<sup>260</sup> *Flour/Aubert/Flour/Savaux* loc.cit. no. 217 p. 140.

<sup>261</sup> Art. 1150 CC reads: "A debtor is liable only for damages which were foreseen or which could have been foreseen at the time of the contract, where it is not through his own intentional breach that the obligation is not fulfilled."

The rule of art. 1151 CC is also applicable in Belgium. Here it is interpreted as the shaping of the causation theory of equivalence.<sup>264</sup> From art. 1150 it also follows that for Belgium a contractual debtor, in as far as he has not acted deliberately, only has to compensate for foreseeable damage.

**105. Italy** Compensation from contractual liability includes in Italian law the obligee's loss suffered and profit lost (art. 1223 CC). The amount of compensatable damage is limited by three criteria.<sup>265</sup> Principally someone is only liable for the immediate and direct consequences of non-performance or delay (art. 1223 CC). The damage must be a normal, everyday consequence of the non-performance;<sup>266</sup> an average careful person must have seen the consequence as probable.<sup>267</sup> There is no compensation for damage which the obligee could have avoided by using everyday care (art. 1227 (2) CC).<sup>268</sup> If culpable conduct by the obligee merely contributed to the damage, the compensation is reduced in line with the gravity of the fault and the extent of the consequences arising from it (art. 1227 (1) CC). Except in the case of intention, compensation is limited to the damage which at the time of the coming into being of the obligation was foreseeable (art. 1225 CC). Damage arising from the non-performance of pecuniary debts are specially regulated in art. 1224 CC. A provision about reparation in kind is missing in contract law (for tort law see art. 2058 CC). Parts of the legal literature<sup>269</sup> and the case law<sup>270</sup> hold art. 2058 CC, however, in agreement with the *Relazione al codice*<sup>271</sup> as being applicable in the area of contractual liability as well. In legal literature there are authors, who see in a compensation claim *in natura* nothing more than a particular manifestation of a contractual law claim for performance (art. 1453 Italian CC; art. 9:102 PECL).<sup>272</sup>

**106. Spain** The legal situation is very similar in Spain. Compensatable damage in the sense of Spanish contract law is defined in art. 1106 CC. In accordance with art. 1106 "the compensation of damage and detriments includes not only the worth of the loss suffered, but also that of the profit, which the obligee could not obtain". Art. 1107 CC adds to this: "Damage and detriments, for which the debtor in good faith is liable, are

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<sup>262</sup> Cornelis, *Algemene theorie van de verbintenis*, no. 446 p. 562.

<sup>263</sup> B.H. Verb. (-Hens) II-4, no. 1841.

<sup>264</sup> van Gerven, *Verbintenissenrecht* I<sup>6</sup> 133-134.

<sup>265</sup> Visintini, *Il risarcimento del danno, L'inadempimento delle obbligazioni*, Trattato di diritto privato diretto da Rescigno, 9, *Obbligazioni e contratti*, Tomo primo (1992) 195-219.

<sup>266</sup> Cass. 20th August 1984, n. 4661, *Giust. civ. Mass.* 1984, fasc. 8.

<sup>267</sup> Cass. 28th January 2000, n. 971, *Rep. Giur. it.* 2000, voce *Danni in materia civile e penale* n. 173.

<sup>268</sup> See on this Cass. 15th March 1989, n. 1306, *Foro it.* 1989, I, 2201.

<sup>269</sup> *De Cupis*, *Il danno, Teoria generale della responsabilità civile*, II (1979), 317; *Di Majo*, *La tutela civile dei diritti* (1987) 216.

<sup>270</sup> Cass. 25th July 1997, n. 6985, *Giust.civ. Mass.* 1997, 1280; Cass. 29th May 1995, n. 6035, *Giust.civ. Mass.* 1995, 1107; Cass. 3rd January 1994, n. 6, *Foro it.* 1994, I, 1783.

<sup>271</sup> *Relazione al codice civile*, n. 802.

<sup>272</sup> *Castronovo*, *La nuova responsabilità civile* (1997) 504-505.

those foreseen or which could have been foreseen at the time the obligation was constituted and which are the necessary consequence of the default in performance.” A debtor is in good faith if he did not act deliberately.<sup>273</sup> A debtor having acted deliberately is liable under art. 1107 para. 2 CC for all damage and disadvantages which arise from the non-performance of the obligation. This is as for a tortfeasor.<sup>274</sup>

**107. Portugal** In the Portuguese *Código Civil* the regime of the duty to compensate was summarized for the whole of civil law liability<sup>275</sup>; the above explanations on tort law therefore also apply for contract law. A special rule on art. 564 (1) CC is found, however, in arts. 899 and 909 of the Portuguese CC. According to this, compensation in the case of the sale of another's objects or objects with a deficiency in title, is limited to the losses suffered (*danos emergentes*).<sup>276</sup>

**108. Germany, Greece, Austria** In the legal systems of Germany, Greece and Austria there is no rule which corresponds to art. 1150 of the *Code Napoléon*.<sup>277</sup> A very complicated law on compensation for breach of contract exists in Austria. It should be kept in mind that in contract law the doctrine of a protective purpose of the norm leads to a limitation of liability.<sup>278</sup> The interests incorporated by the protective purpose of a contract are to be ascertained from the sense and purpose of a contract by way of interpretation. Instead of a wholistic examination in the sense of the theory of adequacy there is an individualised examination of the concrete contractual purpose. Which interests of the other party fall into the contractual area of protection, is decisive. The doctrine of the protective purpose is of importance above all for the limitation of consequential damage resulting from breach of contract. For the scope of responsibility, the remunerative character of the obligation can also be of importance. Following these criteria it is to be judged in how far the contract-breaching debtor must compensate for damage which the obligee has suffered as a result of not being able to perform contracts which he has concluded with third parties, and in respect of which he may have to pay<sup>279</sup> under penalty clauses.<sup>280</sup> For the remainder the following appears to be important: the debtor must bring about through compensation the situation which would have existed finan-

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<sup>273</sup> Cavanillas Múgica and Tapia Fernández, La concurrencia de responsabilidad contractual y extracontractual. Tratamiento sustantivo y procesal (1992) 34; Lacruz Berdejo, Elementos de Derecho Civil, 2. part: Derecho de Obligaciones, 1. vol.: Parte General. Teoría General del Contrato (1999, new edition) 210.

<sup>274</sup> Lacruz Berdejo loc.cit.

<sup>275</sup> See on this “*unidade de toda a responsabilidade civil*” in more detail Menezes Leitão, Obrigações II, 244.

<sup>276</sup> See in more detail STJ 5 December 1975 BolMinJus 252 (1976) 136.

<sup>277</sup> Koziol, Haftpflichtrecht I<sup>3</sup> (1997) no. 8/54, p. 267, with a comparison to art. 74 (second sentence) CISG.

<sup>278</sup> Koziol, loc. cit., no. 8/49, p. 264.

<sup>279</sup> See on this Koziol, loc. cit., no. 8/56, p. 268.

<sup>280</sup> OGH 16th June 1987 JBl 1987, 720.

cially for the obligee if there had been proper performance.<sup>281</sup> Lost profit is in principle only compensated for in the case of gross fault. The claim for compensation of negative interest (*Vertrauensschaden*)<sup>282</sup> (frustrated expenditure)<sup>283</sup> can concur with the claim for positive interest, if the reliance on the (non-materialized) performance was culpably brought about. Even damage from burglary which arises through the delayed installation of protective bars by the contractor carrying out repairs, has to be compensated for.<sup>284</sup> If a house which was bought for renting as a holiday home is destroyed by a fire as a consequence of the defective installation of a tiled stove, and the re-building of the house is not possible, aside the value of the destroyed object which also considers the utility value of its use, the loss of the possibility of profit (rent), (though not for the long-term), is due to him.<sup>285</sup> From the case law, broker costs,<sup>286</sup> fees for setting up a contract and land register costs, costs of taking credit, rescheduling of debts, short term loans and land transfer duty<sup>287</sup> are seen as frustrated expenditures compensatable for in contract law. The compensation of frustrated expenditures in tort law, however, is restricted to particular exceptional cases. The current special regime of compensation for frustrated expenditure in contract law is anything but undisputed.<sup>288</sup>

109. **Sweden** Swedish contract law can not be clearly put in one of the groups already presided over. It appears certain, however, that its rules on the foreseeability of the amount of the compensatable pecuniary damage are not exactly identical to those in tort law, and also that the autonomous Swedish contract law is not in complete agreement with the rule in art. 74 CISG.<sup>289</sup> The Swedish sales law [*köplag* (1990:931)] gears itself to (i) the criterion of adequate causation, (ii) in § 67 (2) no 4 the differentiation between direct and indirect damage<sup>290</sup> and (iii) in § 70 (2)<sup>291</sup> to a mechanism for reduction for reasons of equity.<sup>292</sup> An interesting decision from the area of liability for services

<sup>281</sup> *Reischauer* in Rummel ABGB II<sup>2</sup> (1992) § 1293 no. 13 points out that the term of non-performance damage includes lost profit.

<sup>282</sup> *Reischauer* in Rummel ABGB II<sup>2</sup> (1992) § 1293 no. 14.

<sup>283</sup> *Reischauer* in Rummel ABGB II<sup>2</sup> (1992) § 1293 no. 11 and *Binder* in Schwimann, ABGB V<sup>2</sup> [1997] § 918 no. 87.

<sup>284</sup> OGH 1st September 1920, SZ 2/84.

<sup>285</sup> OGH 18th February 1993, *ecolex* 1993, 381, note *Chr. Huber*.

<sup>286</sup> OGH 26th November 1992, JBl 1993, 516, see on this *Schobel*, *Frustrierte Aufwendungen* (2003), p. 132 in fn. 106.

<sup>287</sup> OGH 25th January 1990, JBl 1990, 585.

<sup>288</sup> Emphatic criticism on this recently by *Schobel* *loc.cit.* 306.

<sup>289</sup> *Ramberg*, *Banks skadeståndsskyldighet vid försenad utbetalning till bankkund*, JT 1991-92 p. 99-104.

<sup>290</sup> The text reads: "The following is to be regarded as an indirect loss: 4. a different similar loss, if it was difficult to foresee".

<sup>291</sup> The text reads: "If damages in consideration of the possibilities to foresee the damage and to prevent its creation and in consideration of the other circumstances are unreasonably high, damages can be reduced."

<sup>292</sup> *Ramberg*, *loc. cit.* 103 f; *Hellner and Ramberg*, *Speciell avtalsrätt vol. I. Köprätt*<sup>2</sup> (1991) 223, 240, 247; *Hellner*, *Speciell avtalsrätt Part II. Kontraktetsrätt. Vol. 2 Allmänna ämnen*<sup>3</sup> (1996) 206, 217.

rendered, is HD from the 26th March 1991.<sup>293</sup> The plaintiff informed his bank that he needed a particular amount of money immediately, and the plaintiff referred to the threat of damage in connection with a property deal. The payment was delayed, however, by 1.5 to 2 hours. The plaintiff therefore could not sell on the realty purchased in a compulsory auction straight away, as was planned, but at the earliest after the course of a few months. He laid claim to lost profit, upkeep of the house, lost commission in respect of a follow-up contract of the original foreseen purchaser and loss of interest through the capital commitment. The Supreme Court allowed the claim for lost profit, but rejected compensation for upkeep, lost commission and loss of interest.

110. **England and Wales** In English law breach of contract as a matter of theory does not require a loss to be actionable. The creditor in the obligation breached is always entitled to nominal damages, meaning by that a nominal sum to represent the fact of breach.<sup>294</sup> In appropriate cases an order for specific performance ordering the party in breach to perform his obligations is alternatively available. However, the court has a wide discretion with respect to making such orders, emphasised by the technical position that they see as a secondary remedy available only where an award of damages does not result in an adequate response of the law.<sup>295</sup> In practice, as an award of nominal damages is not going to be sought by a claimant, English law has had to consider whether in order to obtain more than nominal damages there must be a loss, and, consequentially, what will count as a loss for that to be possible. How the law will develop in respect of this question is at present controversial, and depends upon the implications of a leading case, a House of Lords decision by a bare majority of the court in 2000, *Alfred McAlpine Ltd v Panatown Ltd*. The majority rejected a view that a breach of contract as such can itself be viewed as a loss for these purposes of giving substantial, as opposed to nominal, damages.<sup>296</sup> Notwithstanding this, the concept of loss has been widely interpreted for these purposes in several respects; these will form the background to any future development by the courts of the law: (a) damages may be awarded in appropriate contexts for non-pecuniary losses (see para 136, below) (b) there is some authority that, going beyond the normal categories for that, damages may be awarded to compensate the individual's reaction of disappointment where the "value of the promise [breached] to the promisee exceeds the financial enhancement of his position that full performance will secure",<sup>297</sup> what academic commentators have identified as "consumer surplus"<sup>298</sup> (c) Where the breach results in damage to physical property where the proprietary interests in that property may be transferred by the creditor in the obligation to third party between the time of concluding the contract, and the breach resulting in that damage the creditor in the obligation may recover the loss sustained by that third party, as in contract of carriage of goods,<sup>299</sup> or in a construction contract for building on land that is transferred to a third

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<sup>293</sup> NJA 1991, 217.

<sup>294</sup> *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] A.C. 518.

<sup>295</sup> *Co-operative Insurance Society Ltd v Aryull Stores (Holdings) Ltd* [1998] A.C. 1.

<sup>296</sup> *Alfred McAlpine Construction Ltd v Panatown Ltd* per Lord Clyde.

<sup>297</sup> *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344 per Lord Mustill.

<sup>298</sup> *Harris, Ogus and Phillips* (1979) 95 L.Q. Rev. 581.

<sup>299</sup> *The Albazero* [1977] A.C. 774 per Lord Diplock at 847.

party.<sup>300</sup> This last category is recognised as functionally justified as avoiding otherwise a “black hole” of no liability which would otherwise arise through a defence to a claim by the proprietor at the time of the breach, that there was no contract with him, a hole that would not in all cases be covered by the law relating to third party rights under contracts.<sup>301</sup> There is authority that the category extends to avoid such potential “black holes” also in cases where there is no change of ownership.<sup>302</sup> But that authority, nonetheless, limited such cases to those where the third party did not have any other form of remedy, which in the leading case was held to be the position as it concerned a breach of a building contract entered into (as it was tax advantageous) by one company for building by the defendants on land owned by another associated company in which the defendants also expressly undertook that they had a duty of care in tort, should they be in the event negligent, to that other company.<sup>303</sup> The law is likely to develop further through future case law.<sup>304</sup> Strong arguments have been made in the academic literature,<sup>305</sup> for the law moving towards a position of starting not with a requirement of loss, but with a focus on the performance interest and what the appropriate remedial response in the circumstance to its being affected by the breach should be.

111. **Scotland** There is authority that theoretically Scots law always requires loss as a precondition for any remedy for breach of contract to be available.<sup>306</sup> This is because references to “nominal damages” in Scots law are interpreted not as being a nominal sum, as they are in English law, to represent the fact of breach, but as to referring damages, however small, for the result(s) of a breach.<sup>307</sup> (The use of the term mirrors the same distinction in its use between the Scots law of delict and the English law of tort (see paragraph 101, above)). On the other hand it has been suggested in a recent first instance decision that, because the right to an order of specific implement to require performance of contractual obligations, or a declarator of contractual rights are primary remedies, that loss may not be required where such remedies are asked for.<sup>308</sup> However, an alternative view is that no form of remedy has primacy, the distinction to England being just that there is no hierarchy of remedies at all,<sup>309</sup> and there is some authority, that even in these

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<sup>300</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85.

<sup>301</sup> Contracts (Rights of Third Parties) Act 1999 section 1(3) requires that the third party be identified in the contract.

<sup>302</sup> *Alfred McAlpine Construction Ltd v Panatown Ltd* per Lord Clyde.

<sup>303</sup> *Alfred McAlpine v Panatown Ltd*.

<sup>304</sup> *The Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] UKPC 34 per Lord Thorndon – referred to in *E McKendrick, Contract Law, Text Cases and Materials* (2003) at 1029.

<sup>305</sup> See the in-depth arguments in the commentary to *Alfred McAlpine v Panatown Ltd* in *E McKendrick op cit* at 1027-1034.

<sup>306</sup> In particular *Webster & Co v Cramond Iron Co* (1975) 2 R 752 per Lord President Inglis at 754.

<sup>307</sup> McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed) (2001) 22-95 states the “the term ‘nominal’ is perhaps misleading”.

<sup>308</sup> *McLaren Murdoch & Hamilton v The Abercromby Motor Group* 2002 Sc CS 299 per Lord Drummond Young.

<sup>309</sup> McBryde *op cit* para 23-08 – 23-9.

cases loss is a requirement.<sup>310</sup> In these cases, though, it is not necessary to be able to quantify the amount of loss so long as it is clear that there would be some. In light of this specific implement, which is discretionary, has, for instance been ordered in a number of cases where landlords of shopping centres were seeking to have tenants of individual units in the centre required to remain open for business, the loss being that it was clear that there would be some effect of some sort on the economic value of the shopping centre as a whole.<sup>311</sup> The theoretical justification for a rule requiring loss as a precondition for any remedy for breach of contract has been suggested to be that a breach of contract, even where innocent, is by definition, using the old *ius commune* terminology, an *injuria* and for any *injuria* (as, too, with those acts or omissions that are delictual) for a legal remedy to be available there must also be shown a *damnum*.<sup>312</sup> However, in practice Scots law with respect to what will count as a loss will now follow the lead of the leading English case, *Alfred McAlpine v Panatown*. The law clearly recognises the possibility of damages for non-pecuniary loss (see paragraph 136, below) ((a) above); it may partially already recognise a wider category to reflect the question of “consumer surplus (b) above) as “inconvenience” resulting from breach has sometimes been recognised as loss.<sup>313</sup> New first instance authority that the situations where loss will be recognised to avoid “black holes” in English law apply also in Scots law,<sup>314</sup> and, indeed, the line of authority in English law on the topic derives from an older Scottish case.<sup>315</sup> Again, although the law of third party rights under contracts, in Scotland part of the common law, is perhaps more flexible than the new statutory English law, it will not cover all of these cases.<sup>316</sup> What range of situations will qualify as counting as loss to avoid the “black hole” problem is not, however, fully clear.<sup>317</sup> Should the law in England develop to a focus rather on the performance interest and what the appropriate remedial response to that should be, it will be controversial whether the Scots courts would follow that lead. The recent first instance authority indicates that this would be resisted.<sup>318</sup>

**112. Remoteness and causation** The fundamental rule is that the party in breach is required to pay damages to achieve the position that would have existed had the contract not been breached. This is reflected in not only in the understanding of what is meant by a requirement of loss for actionability; it is also reflected in the wide range of categories of

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<sup>310</sup> *Ibid.*

<sup>311</sup> McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed) (2001) 23 – 10 referring to *Church Commissioners for England v Abbey National plc* 1994 SC 651; *Retail Parks Investments Ltd v The Royal Bank of Scotland (No 2)* 1999 SC 227; *Co-operative Insurance Society Ltd v Halfords Ltd* 1998 SLT 212 and *Highland Universal Ltd v Safeway Properties Ltd* 2000 SLT 414.

<sup>312</sup> *Aarons & Co v Fraser* 1934 SC 137 at 143.

<sup>313</sup> McBryde *op cit* 22-95.

<sup>314</sup> *McLaren Murdoch & Hamilton v The Abercromby Motor Group Ltd.*

<sup>315</sup> *Dunlop v Lambert* (1830) MacL & R 663.

<sup>316</sup> *Ibid.*

<sup>317</sup> See the discussion of *McLaren Murdoch & Hamilton v The Abercromby Mortor Group Ltd* in *W McBryde, Second Cumulative Supplement* (2003) to *W McBryde, The Law of Contract in Scotland* (2<sup>nd</sup> ed) paras 22-06A – 22-06F.

<sup>318</sup> *Ibid.*

loss in respect of which awards have been made. These include, loss of anticipated profits, cost of cure of defects, extra cost of obtaining equivalent performance from another supplier, and in effect in some cases compensating the loss of chances. However, the fundamental rule is qualified by the rule that the loss must not be too remote from the breach. The test applied in both England and Scotland is from a nineteenth century English case, *Hadley v Baxendale*.<sup>319</sup> No distinction, it seems, is made between cases of intentional breach and other forms of breach. This contains two aspects: for the loss in question to be recoverable it must either (1) “be such as may fairly and reasonably be considered ... arising naturally, i. e. according to the usual course of things, from such breach of contract” or (2) “such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”. The second aspect is designed to reflect the fact that particular background factors may have formed part of the context of the parties’ agreement and so that agreement must be taken as impliedly extending the range of situations that will be considered as not too remote. There is considerable uncertainty as to the relationship of the first of these aspects to the test for remoteness in delict/tort, which is a test of reasonable foreseeability. It is now clear, despite some dicta,<sup>320</sup> that the right understanding is to see the approach as one linked to an underlying question as to what were the sort of risks that the contract breaker should in light of the contract be liable for if the loss should eventuate as a result of breach.<sup>321</sup> Accordingly the approach is to ask what would be in reasonable contemplation of the parties at the time of making the contract taking account of what in the context objectively they ought to have known, should breach occur and loss eventuate. This is linked to what is foreseeable, but has been argued to be different in its focus from the more generalised question in delict/tort negligence cases of “foreseeability”. There has been considerable difference of approach in the precise level of contemplation that various verbal formulations by various judges have indicated. Phrases that have been used have included “not unlikely”, “a serious possibility”, “a real danger” and simply “liable to result”.<sup>322</sup> In this way the second aspect becomes part of this wider question, in that additionally even though in the light of what objectively the parties ought to have known the loss in question should it eventuate would not be within reasonable contemplation, there was a particular subjective knowledge of for instances the special features of the other party’s business. Accordingly, in the most recent House of Lords decision on the topic,<sup>323</sup> it was emphasised,<sup>324</sup> that “it is always a question of circumstances what one contracting party is presumed to know about the business activities of the other”. In the case in question it was held that a supplier of electrical power in breach of contract to supply power to a road building

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<sup>319</sup> (1854) 9 Ex 341.

<sup>320</sup> In particular per Lord Denning MR in *Parsons (Livestock) v Uttley Ingham & Co Ltd* [1978] Q.B. 791, making a distinction between physical harm cases and pure economic loss cases.

<sup>321</sup> *Atiyah*, An Introduction to the Law of Contract (5<sup>th</sup> ed) (1995) 467-468 quoted in *E McKendrick*, Contract Law, Text Cases and Materials (2003) 1072.

<sup>322</sup> From *The Heron II* [1969] 1 A.C. 350 as discussed in *H Beale* (ed), *Chitty on Contracts* (28<sup>th</sup> ed) 1999 para 27-46, extracted in *E McKendrick* op cit 1071-1072.

<sup>323</sup> *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 SLT 807.

<sup>324</sup> Per Lord Jancey of Tullichettle at 810.

contractor was not liable for the costs sustained by the road building contractor in having to destroy a partially built aqueduct, being created, by continuously pouring concrete, which then became impossible to continue when the electrical power failed. The rule that the loss to give rise to an award of damages must be caused by the breach, apart from those cases where it is as a matter of fact not a cause at all, is normally subsumed in the application of the remoteness test. There may, however, unusually, be cases where, although not too remote, there is no liability as the breach is not a cause of sufficient importance of the loss in the light of intervening acts by third parties. However, the leading case<sup>325</sup> indicates that it is only in a very extreme situation where this would be held that the breach was no longer a cause of sufficient importance, where on the remoteness test the loss in question was not too remote.

### (3.) Loss of Chance

113. **Loss of chance: general** The national legal positions are different on the question of whether a mere loss of chance can represent a loss giving rise to liability, or whether in this respect an all-or-nothing principle should remain. At its root it is about the problem of whether the loss of the amelioration of the present situation which is at the time of the damage not yet certain (for example the loss of a chance to heal in the case of an uncertain outcome of culpably stopped medical care, or through a loss, caused by a bodily injury, of the chance to take an exam in the current year, the success of which can naturally not be seen as certain) can be qualified *per se* as compensatable damage. If this is answered in the positive, in terms of amount, (only) a probable percentage rate has to be compensated, which has been lost by the injured party; if it is answered in the negative, the injured party in principle receives no compensation whatsoever. It has to do with complex problems in relation to the law of causation and procedural law. The topic is disputed as much on a whole-of-Europe scale as within the many national legal systems. Moreover it affects the interference problem, because now and then it can be viewed differently, as to whether the liability is based in contract or tort. In a recent German investigation, for example, the thesis is represented that in German law a loss of chance can be recognized in contract law as a self-standing head of damage, but not however in tort law.<sup>326</sup> It is to be further stressed that art. 9:501(2)(b) PECL puts forward a rule with an effect only in contract law, whereby “[t]he loss for which damages are recoverable includes future loss which is reasonably likely to occur.” The commentary (p. 436) adds to this: “Future loss often takes the form of the loss of a chance.”

The different provisions regarding liability for the loss of a chance subject professional persons, for instance, to quite different risks – which in turn can entail competitive disadvantages. A tax adviser, who under Italian law neglects within the permitted time to intimate an objection with respect to a tax assessment, where

<sup>325</sup> *A/B Karlshamns Oljefabriker v Monarch Steamship Co Ltd* 1949 SC (HL) 1 – Though a Scottish House of Lords case it is treated as the leading case for England as well.

<sup>326</sup> *Mäsch*, Chance und Schaden. Zur Dienstleisterhaftung bei unaufkläraren Kausalverläufen (to be published Tübingen 2004).

the chances of the objection succeeding are uncertain, can be liable for the loss of the chance of success (Cass. 13th December 2001, n. 15759, Giust.civ.Mass. 2001, 2149)). In German law, by contrast, there is fundamentally no liability (BGH 2nd July 1987, NJW 1987, 325). Likewise, in France patients have a claim in respect of the loss of a chance of being cured, whereas in Germany there is no doubt that they do not (see the following observations). That may bring with it repercussions for the free mobility of patients and impact on competition between hospitals and other health care providing institutions.

Our questionnaires, however, elicited neither a confirmation nor a denial of our thesis. The question was only rarely replied to and even then only to the (unsubstantiated) effect that the matter did not cause problems.

**114. France, Belgium and Luxembourg** In the French legal system the contractual problem of the *perte d'une chance* is discussed in context of the "certain" character of the damage.<sup>327</sup> The *perte d'une chance* qualifies as compensatable damage if the chance was real. The extent of the damage depends upon the probability that the chance would have led to the desired result.<sup>328</sup> In Belgium also, the *perte d'une chance* represents compensatable damage, whereby the extent of damage depends upon the value of the expected advantage and the probability of its occurrence. If necessary it is estimated *ex aequo et bono*.<sup>329</sup> In tort law in France<sup>330</sup> and in Belgium<sup>331</sup> in principle one proceeds in the same way. A requisite is "*la disparition certaine d'une éventualité favorable*".<sup>332</sup> Due to the fact that a loss of chance *per se* is damage, the amount of compensation in tort law also remains necessarily under the value of the advantage not realized.<sup>333</sup>

**115. Italy and Austria** Italy also belongs to the legal systems in which a loss of chance qualifies as a self-standing head of damage. The loss of a chance can represent a *danno ingiusto* in the sense of art. 2043 CC.<sup>334</sup> For Austrian law § 1293 ABGB differentiates between positive damage and lost profit. Following §§ 1323 and 1324 ABGB, lost profit is only to be compensated for in the case of gross fault. The ruining of a chance to purchase can be positive damage or lost profit. It is positive damage if it represents at the time of the damage an independent pecuniary value.<sup>335</sup> It is controversial whether the

<sup>327</sup> Malaurie and Aynès, Contrats et quasi-contrats<sup>11</sup>, no. 575 p. 346-347.

<sup>328</sup> Malaurie and Aynès loc.cit.

<sup>329</sup> B.H. Verb. (-Hens) II-4, no. 1853.

<sup>330</sup> Malaurie and Aynès, Responsabilité délictuelle<sup>11</sup>, no. 241-242 p. 138-139. For Luxembourg see on this Ravarani, La responsabilité civile, no. 700 ff p. 490 ff.

<sup>331</sup> Simoens, Schade en schadeloosstelling, no. 26 p. 54-55.

<sup>332</sup> Flour and Aubert/Savaux, Le fait juridique<sup>9</sup>, no. 138 p. 126.

<sup>333</sup> Cass.civ. 16.07.1998, Bull. Civ. 1998, I, no. 260 p. 181: « *la réparation d'une perte de chance doit être mesurée à la chance perdue et ne peut être égale à l'avantage qu'aurait procuré cette chance si elle s'était réalisée* ».

<sup>334</sup> Cass. 19th December 1985, n. 6506, Foro it. 1986, I, 383; Cass. 29th April 1993, n. 5026, Giur. it. 1994, I, 1, 234; Busnelli, Perdita di una chance e risarcimento del danno, Foro it. 1965, IV, 50.

<sup>335</sup> OGH 8th February 1968, JBl 1968, 473; OGH 29th January 1992, SZ 65/13.

chance to purchase must be legally safeguarded in order to be positive damage. Following the case law, a legally assured chance to purchase is not required, if the profit would very probably have materialized.<sup>336</sup> If the realization of the chance was however, merely possible, and lost profit results, it is only to be compensated for in the case of gross fault. Accordingly it was decided by the OGH, that the partaking in an architect competition gives the partaker a chance, but their loss is not to be compensated for if the defendant acted only with minor fault.<sup>337</sup>

116. **Spain** The Spanish legal system does not differentiate between contract and tort law in the area of liability for the loss of a chance either. It appears however, that Spanish law has come to a result (on the basis of very similar legal texts), which is contrary to that which French law in the meantime regards as established. Damage is only principally compensatable in Spanish contract and tort law, when it is certain (*cierto*).<sup>338</sup> The certainty only refers to the existence of the damage itself, not to the amount (*quantum*). An appropriate basis for valuation is of course required. In respect of liability for lost profit, difficulties can already be seen in this respect<sup>339</sup>, but it has not been excluded. The loss of a chance is, however, qualified by the legal literature as a loss too uncertain to be able to be compensated. It is even said that the courts generally dismiss compensation claims due to loss of chance.<sup>340</sup> A clear piece of evidence for this theory is admittedly lacking. It is nonetheless correct, that in many judgments of the *Tribunal Supremo* it has been stressed that the proof of the existence of damage can not merely be based on bare hypotheses or assumptions. Therefore there is support for saying that liability for the loss of a chance is ruled out in Spanish law.<sup>341</sup>

117. **Portugal** In its judgment of the 2nd December 1976,<sup>342</sup> the Portuguese Supreme Court awarded compensation due to the loss of a chance. The plaintiff had wanted to take part in an open tender for taxi licences. The defendant given the task of carrying this out for him, an agency, had however missed the application period. It was unsure whether the plaintiff would have received a licence in view of the number of applicants. The court even awarded him (besides damages for economic loss) non-material compensation for the loss of a chance to pursue independent gainful employment. The duty to compensate was based in the culpable non-performance of a contract for services (arts. 798 and 1154 CC).

<sup>336</sup> OGH 24th June 1992 SZ 65/94. Contra *Koziol*, *Haftpflichtrecht* I<sup>3</sup> (1997) no. 2/38, p. 38, which only views a chance as being an independent item of property, if the former arises from a subjective right.

<sup>337</sup> OGH 3rd April 1962 SZ 35/42.

<sup>338</sup> T.S. 6th September 1991, RAJ 1991 (5) p. 8349, no. 6045; T.S. 5th October 1992, RAJ 1992 (4) p. 9874, no. 7521.

<sup>339</sup> *Lacruz Berdejo*, *Elementos de Derecho Civil*, 2. Part: Derecho de Obligaciones, 2. vol: Contratos y cuasicontratos. Delito y Cuasidelito. (1999, new edition) 480.

<sup>340</sup> *Lacruz Berdejo* loc.cit.

<sup>341</sup> See as an example T.S. 29th September 1986, RAJ 1986 (3) p. 4849, no. 4922 and T.S. 20th April 1995, RAJ 1995 (3) p. 4637.

<sup>342</sup> BolMinJus 262 (1977) 142.

118. **Sweden** In Sweden the problem is scarcely discussed. In the form of tort law it was examined once by the Supreme Court from the viewpoint of the wording of adequate causation.<sup>343</sup> In contract law in principle wider scope exists, because pure financial losses are also compensated without problem.

119. **United Kingdom** The law in both England and Scotland does not recognise the possibility of a claim based on “loss of a chance” in the sense of a claim based on a breach of contract or a delict/tort which gives rise only to worsened statistical prospects of the occurrence of harm. The question has been largely discussed in the context of tort/delict negligence claims, though it is applicable, too, to cases based on breach of contract.<sup>344</sup> The breach of contract cases where the matter has arisen have been ones where the duty was to take reasonable care. However, it is probably the case that the law is the same where there is a breach of a contract undertaking stricter liability. The Court of Appeal in England has recently rejected<sup>345</sup> arguments seeking to establish that such a concept was by implication introduced to the law by the reaffirmation<sup>346</sup> and elaboration by the House of Lords,<sup>347</sup> of an approach to the proof of factual causation in a negligence case, that permits causation to be established through proof of a “material increase of risk”. A dissenting judgment in this Court of Appeal case, although considering the categories of case, as discussed below, where chance plays a role in the calculation of damages, also agreed that “loss of a chance simpliciter” could not form the basis of a claim.<sup>348</sup> Academic writing,<sup>349</sup> highlighting dangers that would stem from such a claim being recognised, has been expressly approved. These are seen as, for instance, the law recognising claims for damages in the personal injury field by those who have suffered no injuries save for the statistical possibility of future harm, for example because they have been exposed to asbestos dust in the vicinity of an asbestos factory or asbestos workings, without there being any evidence of adverse effects at the time of the claim.<sup>350</sup> Rejection of the possibility of suing for loss of a chance has been specifically grounded on policy considerations.<sup>351</sup> These policy considerations have included a concern that to recognise the possibility would have been to open up a possibility in the area of medical negligence to a large number of claims based on statistical arguments that would be hard to control.<sup>352</sup>

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<sup>343</sup> HD 28th November 1964, NJA 1964, 431 (injury of a student before an exam, that in the estimation of the court he probably would have passed; therefore full compensation) and on that *Dufwa*, in Koch and Koziol (eds.), *Compensation for Personal Injury in a Comparative Perspective* (2003) 314.

<sup>344</sup> As in e.g. *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602; *First Interstate Bank of California v Cohen Arnold & Co* [1996] PNL 17 (CA).

<sup>345</sup> *Gregg v Scott* [2002] EWCA Civ 1471].

<sup>346</sup> Affirming the Court’s approach in an earlier Scottish case, *McGhee v NCB* 1973 SC (HL) 37.

<sup>347</sup> *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

<sup>348</sup> *Gregg v Scott* [2002] EWCA Civ 1471 per Latham L.J. at [39].

<sup>349</sup> In particular *Jane Stapleton*, ‘The Gist of Negligence’ (1988) 104 L.Q. Rev. 213 and 389.

<sup>350</sup> Per Latham L.J. at [39].

<sup>351</sup> Per Mance L.J. at [83].

<sup>352</sup> Per Mance L.J. at [85].

he approach has followed the lead of the Canadian Supreme Court.<sup>353</sup> Specifically it has been formulated in full recognition of other competing policy factors, that have given rise to courts in some jurisdictions in the United States of America,<sup>354</sup> recognising the concept, such as that not to recognise it does result in some situations of tort in there being an unenforceable duty, where the duty is about protecting against statistical chances. The rejection of the concept carries with it also the rejection of an approach in product liability cases that a manufacturer of a generic product where a claimant is shown to have sustained harm from that type of product could be liable for a proportion of that harm depending on the proportion of the market share for that product enjoyed by it.<sup>355</sup> The rejection of the concept of loss of a chance, in the sense discussed in the previous paragraph, has not been to reject the use of statistical evidence in certain types of case. These are cases where it is shown in the normal way that the breach of contract or tort/delict has caused some “past” injury and there is then a question of its evaluation. Incrementally, the Courts have developed various categories. These have been interpreted as consistent with the House of Lords decision,<sup>356</sup> relied on by the Court of Appeal as a basis for rejecting the wider concept. Traditionally, as matter of analysis, these categories were considered not to be the recognition of distinct heads of damages constituted by the loss of a chance, but the evaluation of chances in the calculation of the sum due as damages.<sup>357</sup> In these cases the damages are awarded on a “broad basis”, and not generally through an exact statistical assessment of the chances. As such these categories have normally been explained as lying within the law governing the quantum of damages, as opposed to the law concerning whether liability is or is not established. Recently, however, through emphasis on the policy choices lying behind their recognition, the distinction between liability and the question of calculation of damages, has come to be seen as to some extent artificial and not “absolutely clear-cut”.<sup>358</sup> Examples of this sort have been seen as justified by analogy with the routine situation arising in standard personal injury cases, where the future impact of the injuries on the claimant’s life and economic situation, inevitably depends on assessing probabilities of deterioration or improvement etc.<sup>359</sup> Firstly, it has long been recognised that where the claimant is proved to have sustained harm that can itself be characterised as something other than loss of “loss of chance”, but which is alleged to have financial consequences for the claimant, a court may assess chances lost determining a figure for that head of damages. So, where liability was established for having caused a personal injury the court was able to make an award of damages for the fact that the injured person was prevented by his injuries from taking, at the time he would normally have done, examination, which he

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<sup>353</sup> Gonthier J in *Lawson v. Lafferrière* (1991) 78 D.L.R. 609, 654d-g and 656d-f.

<sup>354</sup> *Herskovits v. Group Health Cooperative of Pugin Sound* (1983) 664 P.2d 474; *Sindell v. Abbott Laboratories* 26 Cal. 3d 588 (1980).

<sup>355</sup> As, in contrast, recognised in California in *Sindell v. Abbott Laboratories* 26 Cal. 3d 588 (1980).

<sup>356</sup> *Hotson v East Berkshire Health Authority* [1987] A.C. 750.

<sup>357</sup> Per Latham L.J. at [41].

<sup>358</sup> *Gregg v Scott* [2002] EWCA Civ 1471 per Mance L.J. at [66].

<sup>359</sup> Discussed in *Allied Maples Group Ltd. v. Simmons & Simmons* [1995] 1 W.L.R. 1602 (CA).

had a chance of passing and which would have accelerated his chances of promotion.<sup>360</sup> Secondly, where there is proved that there is a loss of an economic asset, the value of which by its nature depends on chances dependant at least in part on the behaviour of third parties, liability can be based on proof that the claimant has (or had) a real or substantial chance (as opposed to a speculative chance) of that occurring. Applying this approach, compensation has been given in a personal injury case where the injuries resulted in the claimant being prevented from competing for a prize, though rejected where the evidence of potential succession was too speculative.<sup>361</sup> So where a lawyer is proved to have allowed a client's claim against a third party to have become time barred, the chances lost of obtaining full or partial success, whether through court action or negotiation are taken into account.<sup>362</sup> By extension, it has been held that where a lawyer negligently advised a commercial client of steps that would have increased substantially his chances of being released by a landlord from liability for certain obligations under tenancy agreements liability could be established on this principle.<sup>363</sup> Argument seeking to exclude this extended approach as confined to English and not part of Scots law has been rejected.<sup>364</sup> There is authority that in the sort of case the amount can be based on a percentage chance that existed of making an economic basis, as in a case where a firm of accounts failed to advise to sell a property at a particular date, the amount of loss was assessed in the light of a percentage chance of achieving a particular figure at that date.<sup>365</sup> Thirdly, in cases based on negligent failure on the part of healthcare professionals, such as doctors, to give appropriate information as to possible adverse outcomes of a medical procedure when obtaining a patient's consent to treatment, following the lead of the Australian courts,<sup>366</sup> exceptionally, it may be that damages are calculated in the light of the chance that the claimant might have refused her consent.<sup>367</sup> However, the Court of Appeal has expressly rejected an attempt to extrapolate from this example any general rule to the effect that where negligence consists of a breach of duty to protect against a risk that does eventuate there will be liability. So in a case where the only evidence is that if a patient had been treated his or her chances of avoiding an adverse outcome would have in a statistical sense been better liability cannot be established.<sup>368</sup>

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<sup>360</sup> *Kitchen v Royal Airforce Association* [1958] 1W.L.R. 563.

<sup>361</sup> *Neill v Scottish Omnibuses Ltd* 1961 SLT (Notes) 42 – alleged failure to become boxing “featherweight champion of the world”, rejected per Lord Cameron as “inviting a speculative inquiry ... unsuitable for investigation and evaluation by court as the prospects of a particular horse winning a particular race.”

<sup>362</sup> E. g. *Yeoman v Ferries* 1967 SLT 332.

<sup>363</sup> *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602.

<sup>364</sup> *Paul v Ogilvie* [2000] Scot CS per Lord Hamilton.

<sup>365</sup> *First Interstate Bank of California v Cohen Arnold & Co* [1996] PNLR 17 (CA).

<sup>366</sup> *Chappel v Hart* [1999] Lloyd's Law Reports: Med 223.

<sup>367</sup> *Chester v Afshar* [2002] EWCA Civ 724.

<sup>368</sup> *Gregg v Scott* (above).

#### (4.) Damages for Non-economic Loss

##### (a) Tort law

**120. Two basic models** Important differences between contractual and tortious liability exist in many jurisdictions of the EU member states in the area of liability for non-economic loss. For non-contractual liability there are no longer any legal systems which would remove non-economic loss from the sphere of legally relevant damage. The conditions on which such a claim is granted, however, are anything but the same, and the same is true of the amount of the sums granted by the courts.<sup>369</sup> Essentially two basic models are found. In one part of the European tort law orders, in principle all damage is compensatable. In the other jurisdictions on the other hand, the principle is held that “immaterial damage” (non-economic loss) is only compensatable if the law explicitly orders this legal consequence. In border areas moreover, there exists a lack of unity to the question of which damages to feelings should enter the equation of pecuniary compensation.

Differences between the law of tort in the various countries as to the conditions to be established for non-contractual liability to compensate for non-patrimonial loss, and as regards the quantum of compensation, have a relevance to the operation of the internal market above all in those situations where a particular commercial activity or a particular service is exposed to a special risk of causing non-patrimonial losses. Doctors or passenger carriers in certain countries, for instance, have no need at all to take into consideration in the case of negligently caused death a claim by the surviving close relatives for compensation for their bereavement. (That is the position in Germany and the Netherlands, for example). Under the law of certain other countries (for instance France and Spain), in contrast, there may be liability to pay substantial sums (see the following overview). Such differences in the legal position may play a role in decisions as to where a business is located, and also can affect the cost of obtaining insurance. However, this thesis was not confirmed by our questionnaire. We received almost no responses on this point. In one reply we were informed that potential liability for non-economic loss leads to higher insurance premiums; another indicates that the problem is not economically relevant. One national association stated that damages for pain and suffering play a less significant role for industry than, for example, for the media.

**121. Belgium, France, Luxembourg, Spain** Belgian, French and Luxembourgian law go on the basis that not only material, but also non-material damage is to be compensated which the tortfeasor has attributably caused.<sup>370</sup> Consequently a breach of the protected

<sup>369</sup> Further on this point *v. Bar*, *Schmerzensgeld in Europa*, *Festschrift Deutsch* (1999) 27-43 and *McIntosh and Holmes*, *Personal Injury Awards in EC countries* (London 1990).

<sup>370</sup> Fundamental for French law Cass.civ. 13th February 1923, D. 1923, I, 52; for Luxembourg see amongst others Cass. lux. 10th May 1990, Pas. lux. 1990-92, 37.

droits de la personnalité can represent damage in the sense of tort law.<sup>371</sup> In the view of the Belgian case law, compensation for non-material damage is aimed at easing pain, sadness or other non-material suffering.<sup>372</sup> In respect of the legal consequences, there is no differentiation between liability from *faute* and the strict liability of a *gardien*. The Spanish *Código Civil* also orders in art. 1902 (as in the *Code Napoléon* in arts. 1382 and 1383) merely the compensation of “damage” already having arisen, without differentiating between material and non-material damage. Only “material damage” (*daño material*) was seen as being compensatable originally, that being until a decision of the *Tribunal Supremo* of the 6th December 1912.<sup>373</sup> Since this decision the legal situation has fundamentally changed, however. The Spanish courts recognize in continuous case law that non-material damage is compensatable.<sup>374</sup> Aside from this, it is to be expressly compensated for following art. 110 (3) *Código Penal*, if the civil law liability has its basis in the committing of a criminal act. Law 1/82 from 5th May 1982 on civil protection of laws of honour, of the intimate sphere and the right to one’s own image, expressly further refers to non-material damage. Spanish legal literature therefore does not pay much attention anymore to the differentiation between economic and non-economic loss. For property damage all disadvantages are calculated in goods which belong to the person affected.<sup>375</sup> It is more difficult to ascertain what is to be evaluated as *daño moral*. In general it is true that *daño moral* includes all damage which has no economic content<sup>376</sup> and all breaches of rights of personality which are to be compensated independently from their property law consequences.<sup>377</sup>

**122. Portugal** In the basic norm of art. 483 (1) of the Portuguese CC, material and non-material damage are included. Art. 483 (1) CC is supplemented by art. 496 CC where non-economic loss (*danos não patrimoniais*) is only to be compensated for financially if it

<sup>371</sup> For French law see: *Viney/Jourdain*, Les conditions de la responsabilité<sup>2</sup>, No. 256 ff. p. 28 ff.

<sup>372</sup> Cass. belg. 3rd February 1987, Pas. 1987, I, 644.

<sup>373</sup> The decision has not been published to our knowledge, but is however cited on numerous occasions in Spanish legal literature (without giving a source), amongst others by *Lete del Río*, Derecho de Obligaciones, 2nd. vol. El contrato en general. Cuasicontratos. Enriquecimiento sin causa. Responsabilidad Extracontractual<sup>3</sup> (1998) 193; *Jaime Santos Briz* in: Comentarios al Código Civil y Compilaciones Forales (ed. by Albadalejo), 26th vol. (1984) 169; *Albadalejo*, Derecho Civil, 2nd. Part: Derecho de Obligaciones, 2nd. vol.: Los contratos en particular y las obligaciones no contractuales<sup>10</sup> (1997) 535; *Lacruz Berdejo*, Elementos de Derecho Civil, 2nd. Part: Derecho de Obligaciones, 2nd. vol.: Contratos y cuasicontratos. Delito y Cuasidelito. (1999) 482; *Lasarte Álvarez*, Principios de Derecho Civil, 2nd. vol.: Derecho de Obligaciones<sup>5</sup> (1998) 340.

<sup>374</sup> See for example T.S. 26th January 1972, RAJ 1972, vol. 1., p. 119, no. 120; T.S. 19th December 1986, RAJ 1986, vol. 5., p. 7682, no. 7682.

<sup>375</sup> *Lacruz*, loc.cit. 479.

<sup>376</sup> *Lacruz*, loc. cit. and *Lete del Río*, loc.cit. 193.

<sup>377</sup> *Lacruz*, loc. cit.; *Lete del Río*, loc. cit. and *Díez-Picazo/Gullón*, Instituciones de Derecho Civil. 1. vol.: Introducción. Parte general y Derecho de la persona. Disciplina general de los contratos y de las obligaciones. Contratos en particular, cuasi contratos, enriquecimiento sin causa y responsabilidad extracontractual (1995) 828.

“is worthy of legal protection due to its severity.”<sup>378</sup> On the other hand, Portuguese law does not contain a rule corresponding to the German § 253 (1) BGB and the Greek art. 299 CC, whereby compensation for non-material damage only comes into the equation in cases determined by law. The amount of damages is to be determined by fair judgment of the courts. An important factor which is always to be considered is the extent of the fault of the tortfeasor.

**123. Germany** The German law on the compensation for non-material damage has been reformed with effect from the 1st August 2002 by the “second law on the changing of compensation law measures” from the 18th April 2002.<sup>379</sup> The starting point is now as before § 253 (1) BGB, in which compensation of non-economic loss only enters the equation in cases expressly determined by law. What is new, however, is § 253 (2) BGB, which defines: “If compensation is to be given on account of an injury to the body, health, liberty or right of sexual self-determination, then on account of damage, which is not economic loss, equitable compensation in money can also be demanded.” This rule concerns contractual, tortious and strict liability under the codification. In addition they are referred to (with a few modifications) in all specially legally regulated situations of objective liability.<sup>380</sup> In the case of the loss of close relatives, non-economic loss is only replaced if the loss leads to a medically relevant injury to the mental health of a member of the bereaved family.<sup>381</sup> Non-material damage resulting from damage to property (for example damage due to vandalism) is not compensatable. Not covered by § 253 (2) BGB is the compensation of non-economic loss in the case of breach of non-corporeal rights of personality (in general and specific rights of personality). Such a claim is based, from recent case law, no longer on the BGB, but directly on arts. 1 (human dignity) and 2 (protection of personal freedom of development) of the *Grundgesetz* (the constitution).<sup>382</sup>

**124. Greece** Art. 299 of the Greek CC is the equivalent of § 253 (1) BGB. Also according to this provision, financial compensation for non-economic damage is only owed in cases defined by law. Art. 932 CC belongs to these special situations, whereby in the case of a delict, equitable financial compensation for non-material damage suffered, is provided for. The claim exists independently of the existence of economic loss.<sup>383</sup> Also

<sup>378</sup> On this see for example STJ 18th November 1975, BolMinJus 251 (1975) 148, whereby pure troubles are not the basis of a duty to compensate.

<sup>379</sup> BGBl. 2002 I 2674.

<sup>380</sup> See § 11 sentence 2 StVG, § 6 Sentence 2 HaftPflG, § 36 Sentence 2 LuftVG, § 87 Sentence 2 AMG, § 32 Abs. 5 Sentence 2 GenTG, § 29 Abs. 2 AtomG, § 8 Sentence 2 ProdHaftG and § 13 Sentence 2 UmweltHG. These claims largely correspond to § 253 (2) BGB.

<sup>381</sup> BGH 11th May 1971, BGHZ 56, 163; BGH 4th April 1989, NJW 1989, 2317; Palandt-Heinrichs, BGB<sup>62</sup>, § 253, no. 12, Introduction to § 249, no. 71.

<sup>382</sup> BGH 1st December 1999, BGHZ 143, 214, 218; BGH 15th November 1994, BGHZ 128, 1, 15; in this sense also BGH 19th September, BGHZ 35, 363, 367.

<sup>383</sup> Paterakis, I chrimatiki ikanopoiisi logo ithikis vlavis (1995) 244, 253; Georgiades/Stathopoulos (-Georgiades), Astikos Kodikas IV Eidiko Enochiko (1982) Art. 932 no. 4; Deliyannis and Kornilakis, Eidiko Enochiko Dikaio III (1992), 291.

independent of this is whether or not the liability is based on fault.<sup>384</sup> Articles 57 and 59 CC provide for the compensation of non-material damage resulting from infringement of rights of personality. Art. 59 goes further than art. 932 CC in as far as it provides for other methods of redress besides monetary compensation. Within the framework of art. 932 CC, reparation is allowed for in respect of immaterial damage which constitutes the consequence of a tort. This is because art. 932 sentence 2 only contains examples of rules and is expressed not to be exhaustive.<sup>385</sup> With the killing of a person, the members of their family have a claim to non-material compensation for the psychological disturbance suffered (art. 933 sentence 3). The term “family” has been interpreted widely in Greek case law. As such non-material compensation following art. 933 sentence 3 has been awarded to parents,<sup>386</sup> to parents-in-law<sup>387</sup> and spouses living separately.<sup>388</sup> For the strict liability of a manufacturer it was claimed that it does not include a duty to compensate for non-material damage.<sup>389</sup> In the forming of this view art. 6 (7) of the consumer protection law is referred to, which in respect of non-material damage, orders that for compensation the provisions on delicts apply.<sup>390</sup> This interpretation of the consumer protection law is anything but conclusive however.<sup>391</sup> The case law has, as has already been noted, always granted non-material damage even in cases of strict liability.<sup>392</sup>

**125. Italy** The principle in which non-economic loss is only compensated for in cases determined by law, is also found in Italy (art. 2059 CC). Cases in which the breach of a criminal law appears at the same time as a tort, are at the foreground (art. 185 CP). The exact area of application of the claims in arts. 2043 and 2059 CC has occupied academics and the case law for a long time. It has reinforced until very recently an interpretation of art. 2059 CC, whereby this claim, regardless of its wording (“non-economic loss”), only

<sup>384</sup> *Kornilakis*, I evthini apo diakindinevsi (1982), 185; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III (1992), 290; *Paterakis*, I chrimatiki ikanopoiosi logo ithikis vlavis, 263; *Georgiades/Stathopoulos [-Georgiades]* Art. 932 no. 5; A.P. 444/1964 NoB 12 (1964) 1075; CA Patras 256/1984 NoB 32 (1984) 1567).

<sup>385</sup> See from the case law for example: A.P. 1589/1979 NoB 28 (1980) 1115, 1117 and CA Athens 658/1975 NoB 23 (1975) 508 (non-material damage in property damage); CA Athens 3995/1970 Arm. 1971, 410 (the killing of a dog); CA Thessaloniki 1809/1990 Arm. 1990 440 (parent’s liability; daughter damaged a car); CA Thessaloniki 455/1982 Arm. 1983, 212 (a brawl in a pub caused by the defendant; also non-material damage of the plaintiff landlord).

<sup>386</sup> A.P. 404/1964 NoB 12 (1964) 1000.

<sup>387</sup> CA Athens 4287/1988 EllDik 30 (1988) 1464.

<sup>388</sup> CA Athens 5805/1991 EllDik 33 (1992) 1495.

<sup>389</sup> Further *Karakostas*, Liability for Defective Products and Services; Emergence of a Worldwide Standard?, *Rev. Hell. de Droit Int.* 55 (2002) 43-48 (44).

<sup>390</sup> *Karakostas*, Prostaia tou katanaloti, 122; *Avgoustianakis*, in: *Stathopoulos/Chiotellis/Avgoustianakis*, *Koinotiko Astiko Dikaio I*, 148 f.

<sup>391</sup> *Eleftheriadou*, *Phi* 1999, 102, 107.

<sup>392</sup> See also CA Athens 6704/1996 EllDik 38/1997, p. 846, 848-849 and from the literature *Paterakis*, I chrimatiki ikanopoiosi logo ithikis vlavis, 263 and *Georgiades/Stathopoulos (-Georgiades)* art. 932, no. 5.

refers to purely moral damage, which comes into being as a result of emotion.<sup>393</sup> Recent decisions of the constitutional court<sup>394</sup> and the *Corte di Cassazione*<sup>395</sup> now interpret the term “non-economic loss” in a broader sense incorporating personality damage.<sup>396</sup> The extent of a claim is determined by a judge following his free discretion. The gravity of the injury, the intensity of the emotion, the sensitivity of the injured party, his age and gender as well as the economic situation of the affected person, are taken into consideration.<sup>397</sup> The *Corte Costituzionale* has already confirmed that art. 2059 CC is in line with the constitution.<sup>398</sup> Very recently the legislator has also declared moral damage compensatable in individual cases, even if it is not the consequence of a crime. Examples are to be found in law 675/1996 on the handling of personal data and in law 89/2001 on unjustifiably long-lasting court cases. Independent from art. 2059 and under the influence of article 32 of the constitution (protection of health), biological damage is compensated for.

**126. The Netherlands** In the Netherlands a similar approach is used to that in Germany, Greece and Italy. Art. 6:162 of the Dutch BW establishes liability for damage of every kind, but the extent of the duty to compensate only comes to light from the measures in art. 6:95 ff. BW. Art. 6:95 BW in turn reads (translation by *Haanappel and Mackaay* 1990): “The damage which must be repaired pursuant to a legal obligation to make reparation consists of patrimonial damage and other harm, the latter to the extent that the law grants a right of reparation thereof.” Art. 6:95 BW therefore expressly differentiates between economic damage and other disadvantages; the latter are only compensatable in as far as the law also grants a claim for their compensation. Under “other disadvantage” so-called non-material (non-material or non-economic) damage is understood.<sup>399</sup> It is recoverable in accordance with the requisites of Art. 6:106 BW. The provision essentially concerns (a) the intentional causing of non-material disadvantages, (b) breaches of corporeal and non-corporeal rights of personality and (c) interference with the remembrance of the deceased.

<sup>393</sup> Corte Cost. 14th July 1986, n. 184, Foro it. 1986, I, 2976; Foro it. 1986, I, 2053; Giur. It. 1987, I, 1, 392 further *Giannini*, Il risarcimento del danno alla persona nella giurisprudenza (1991) 259-285. For the previous history see further *Scognamiglio*, Il danno morale, Riv. dir. civ. 1957, 277-336.

<sup>394</sup> Corte Cost. 27th October 1994, n. 372, Foro it. 1994, I, 3297; Giur. It. 1995, I, 406; Corte Cost. Ord. 22nd July 1996, n. 293, Giur. It. 1997, I, 314.

<sup>395</sup> Cass. 13th January 1993, n. 357, Foro it. 1993, I, 1897; Cass. 17th June 1996, n. 5542, Giur. It. 1997, I, 1, 37.

<sup>396</sup> *Castronovo*, Danno biologico. Un itinerario di diritto giurisprudenziale (1998), *passim*.

<sup>397</sup> Cass. 2nd July 1997, n. 5944, Giust.civ.Mass. 1997, 1117.

<sup>398</sup> Corte Cost. 14th July 1986, n. 184, Foro it. 1986, I, 2976; Foro it. 1986, I, 2053; Corte Cost. 27th October 1994, n. 372, Foro it. 1994, I, 3297; Giur. it. 1995, I, 406; Corte Cost. 22nd July 1996, n. 293, Giur. it. 1997, I, 314. For damage to health see further Corte Cost. 26 July 1979, n. 88, Foro it. 1979, I, 2542.

<sup>399</sup> Further *Asser-Hartkamp* 4-I nos. 464 ff., p. 403 ff.

127. **Austria** The Austrian case law also considers non-material damage in principle only recoverable if there is an explicit legal rule.<sup>400</sup> A provision in the ABGB which would expressly regulate this manner of proceeding, is lacking however. In the legal literature, the view is held that § 1323 ABGB provides a general basis for the rule that non-material damage in the case of damage being caused by gross fault, is always compensatable.<sup>401</sup> In any event the recent case law of the OGH is approaching this in terms of result.<sup>402</sup> In this case the court granted parents who had lost their child, compensation for the non-material injury to feelings suffered because of the loss. Compensation is only owed, however, in the case of intention or gross negligence.<sup>403</sup>

128. **Scandinavia** In the Scandinavian legal systems economic and non-material damage are likewise differentiated. The latter is again in principle only compensatable if it is provided for by law (or by the respective contract). An explicit statutory provision which would support this last-mentioned basic rule, is, exactly as in Austria, lacking.<sup>404</sup> In Swedish law a so-called compensation for damage to one's feelings can be awarded both for damage to persons as well as to property.<sup>405</sup> The legal basis for this is found today in Chap. 2 § 3 of the Liability Act.<sup>406</sup> In Danish law § 26 *Erstatningsansvarslov* regulates the compensation for damage to one's feelings, and Finnish law regulates compensation claims arising from so-called "suffering" in chap. 5 § 6 of the Finnish Liability Act. In the Swedish law of today the compensation of so-called "particular interferences" following chap. 5 § 1 no. 3 (in contrast to the old compensation for so-called "other interferences") only now includes non-material damage.<sup>407</sup> The compensation for pain and affliction (*sveda och värk*) or for other lasting hindrances (*lyte eller annat stadigvarande men*) following chap. 5 § 1 no. 3 is also of a non-material nature. The corresponding rules in Danish law are found in § 1 in conjunction with §§ 3-4 *Erstatningsansvarslov*, and those of Finnish law in chap. 5 § 2 of the Finnish Liability Act. It contains, however, a special provision on the "particular interferences". Furthermore, non-material damage is compensated for in the areas of legal protection of industrial property and the right to bare a name.<sup>408</sup> Finally, reference should be made to § 29 (2) of the Swedish marketing

<sup>400</sup> Rummel (-Reischauer) ABGB II<sup>2</sup> § 1324 no. 11 and OGH 26th April 1989, JBl 1989, 792=RS 0022551.

<sup>401</sup> Bydlinski, JBl 1965, 173 and 237, 247.

<sup>402</sup> OGH 16th May 2001, RS 0115189 = ZVR 2001, 284, note *Karner*; see further *Fötschl*, VersRAI 2001, 60.

<sup>403</sup> Criticism of this by *Schobel*, Ersatzfähigkeit reiner Trauerschäden – Generelle Rechtsprechungswende bei immateriellen Schäden?, RdW 2002/195, p. 206, 208 f., which promotes the thesis that in the area of strict liability also, an extraordinarily high dangerousness which clearly exceeds the "particular dangerousness" required to establish liability, is equivalent to gross fault.

<sup>404</sup> *Hellner and Johansson*, Skadeståndsrätt<sup>6</sup>, 371; *Vinding Kruse*, A., Erstatningsretten<sup>5</sup> (1989) 346.

<sup>405</sup> *Hellner and Johansson*, loc. cit. 373.

<sup>406</sup> On the most recent changes see *Sandstedt*, Kurze Informationen über die Änderungen im schwedischen Deliktsrecht, VersRAI 2002, 9 (10).

<sup>407</sup> *Sandstedt*, loc. cit. 11.

<sup>408</sup> *Hellner and Johansson*, Skadeståndsrätt<sup>6</sup>, 373, footnotes 56 and 57.

law (*marknadsföringslag*),<sup>409</sup> which reads: “In determining the reparation to be provided to a business enterprise, circumstances which are not of an economic nature may be taken into consideration.” In the framework of § 21 credit information law [*kreditupplysningslag* (1973:1173)] and § 18 Debt Recovery Act [*inkassolag* (1974:182)] suffering and other disadvantages of a non-economic nature are also taken into account. In accordance with § 48 (1) personal data law (concerning data protection) [*personuppgiftslag* (1998:204)] compensation for the damage to one’s feelings is awarded in the case of conduct contrary to the law. § 54 of the law on worker participation [*lag* (1976:580) *om medbestämmande i arbetslivet*] provides a compensation claim for violations of this law; here also, disadvantages of a non-economic nature may be taken into consideration (§ 55). In § 3 (1) of the law on names and images in advertising [*lag* (1978:800) *om namn och bild i reklam*] a corresponding claim following the disallowed use of names or images in advertising is provided for, as long as the breach of the law occurred deliberately or negligently.

**129. United Kingdom** In both English law and Scots law damages for non-pecuniary loss are available where the delict/tort results in physical personal injury, death, psychiatric injury, intentional invasion of a person’s personal sphere, defamation, or where there is nuisance affecting the environment of immoveable property.<sup>410</sup> In cases of nuisance in English law this is confined to householders, on a view that the tort is aimed at protecting land.<sup>411</sup> However, recently in effect such a claim has been recognised in cases against public authorities as available to a wider range of people affected though basing the claim on a breach of Human Rights law.<sup>412</sup> In Scots law, though there is scant authority on the question,<sup>413</sup> an award of non-pecuniary loss can be made to a family member in a nuisance case.<sup>414</sup> The question whether a distinction between intention and other bases of liability has a bearing on whether non-pecuniary damages are available is in English law currently controversial. The view has been expressed judicially that in all torts involving intention damages for non-pecuniary loss are always available for distress, inconvenience or discomfort.<sup>415</sup> If this is correct and to be taken literally, it would follow that damages to reflect this could be awarded in cases of intentional invasion of another’s immoveable or moveable property, or in cases of fraud, for instance. However, it is probable that non-pecuniary damages cannot be awarded in such cases, and this approach is too wide. The position then would be that in cases of nuisance affecting the environment of immoveable property, of torts involving invasion of a person’s personal sphere, also through a statutory innovation in cases of harassment, and in defamation cases non-pecuniary damages can be awarded at a higher than nominal figure.<sup>416</sup> (Nominal damages are available in respect of those torts that are actionable per se). Otherwise

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<sup>409</sup> SFS 1995:450.

<sup>410</sup> *Hunter v Canary Wharf* [1997] A.C.

<sup>411</sup> *Ibid.*

<sup>412</sup> *Marcic v Thames Water Facilities* [2002] EWCA Civ 64.

<sup>413</sup> *N R Whitty*, Stair Memorial Encyclopaedia sv Nuisance (Reissue 2001) para 134.

<sup>414</sup> *Shanlin v Collins* 1973 SLT (Sh Ct) 21.

<sup>415</sup> *Hunter v Canary Wharf* [1997] A.C. 655 per Lord Hoffmann.

<sup>416</sup> Protection from Harassment Act 1997.

psychiatric injury, physical injury to the person (or death) must be proved.<sup>417</sup> This is the position in Scots law,<sup>418</sup> where also the concept of nominal damages is not recognised as such, being rather very low awards of non-pecuniary loss. In cases of psychiatric injury where the claim is based on negligence but takes the form that it is alleged to have arisen as a result of becoming aware of injuries caused or about to be caused to a third party there will be no liability at all unless there is in the light of the relationship to the victim of the person suffering the psychiatric injury and the spatial and temporal closeness to the event, and the general nature of it, seen to be a relationship of proximity, such that it is fair and reasonable for a duty of care to be capable of arising.<sup>419</sup> The same is probably true of cases of psychiatric injury based on such facts where liability is strict, as in a products liability case.<sup>420</sup> Non-pecuniary damages are generally available in strict liability cases on the same basis as they are in negligence cases. Reflecting this the statutory strict liability products liability regime<sup>421</sup> specifically provides for the avoidance of doubt with respect to death claims, awards in which are controlled by statute that this is the case.<sup>422</sup> In the law of defamation liability is strict and awards under this head can be large. In both England and Scotland defamation cases can be heard and decided by jury trial. In response to the European Court of Human Rights<sup>423</sup> holding that jury awards without any control result in this field in a potential breach of Art. 10 ECHR (freedom of expression), control at appellate level has now been instituted, putting maximum levels on such awards. The terminology for describing awards of non-pecuniary damages differs between English and Scots law. In certain small ways only does this reflect any difference of substance. In Scotland these awards are categorised as awards of *solatium* as opposed to damages for “patrimonial loss”. In England they are awards made under the head of “general damages”, which is the heading that comprehends all aspects of a claim that are not capable of precise assessment. In cases of physical personal injury the award in England is characterised within this as an award for “pain and suffering and loss of amenities of life”. The Law Commission for England and Wales has, following a detailed consideration of the law, confirmed that it considers that it is appropriate for such awards to continue to be made available. Its reasons are that to reform the law to abolish the right to such damages would discriminate unfairly against those injured persons, who happen not to suffer any substantial pecuniary loss, and empirical study has shown that

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<sup>417</sup> For this view see recently *Tony Weir*, Tort Law 147-148.

<sup>418</sup> *Ward v Scotrail Railways* 1999 SC 266.

<sup>419</sup> *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310 (HL) and subsequent House of Lords Cases.

<sup>420</sup> The question has never been considered, but arguably follows from the meaning of the word “caused” in Consumer Protection Act 1987 section 2(1), although in other situations of psychiatric injury there would be liability under the Act for psychiatric injury, as “person injury” is defined (section 45) as including “disease and any other impairment of a person’s ...mental condition”.

<sup>421</sup> Consumer Protection Act 1987 section 6 1(a) and (c).

<sup>422</sup> Fatal Accidents Act 1976 as amended (England); Damages (Scotland) Act 1976 as amended (Scotland).

<sup>423</sup> *Tolstoy v United Kingdom* 1995 20 EHHR 442.

the public consider such awards appropriate.<sup>424</sup> As a result of case law development in Scotland in the 1970s,<sup>425</sup> English awards of this type came to be treated as guidance to be followed in assessing the comparable *solatium* award in Scots cases in which the injuries and impact on life of the injured person were comparable. It has been recommended, too, that English courts should in such cases, likewise, be aware of the level of awards in Scotland.<sup>426</sup> In both jurisdictions the general nature of such awards results in them also being made in cases where the claimant is permanently unconscious and shown not to be suffering any pain.<sup>427</sup> In Scotland this position was arrived at<sup>428</sup> analysing *solatium* award for personal injury into three components (while awarding one figure), namely, pain and suffering, loss of faculties and amenities, and loss of expectation of life, which roughly map onto the factors that are considered in an English award. A contrast between the two systems is that in Scotland personal physical injury cases (and death cases) can be decided by jury trial. It has recently been confirmed that the availability of this is not in breach of the European Convention of Human Rights.<sup>429</sup> Reflecting this contrast, the appellate courts in Scotland do not by judicial declaration raise the going rate for certain typical types of injury to bring awards into line with a feeling that awards are generally too low, as the English Court of Appeal has done from time to time.<sup>430</sup> This is seen in Scotland as inconsistent with the fundamental principle that the award should be fair compensation tailored to the individual case.<sup>431</sup> In death cases in Scotland awards for non-pecuniary loss by the Damages (Scotland) Act 1976 were reclassified by abandoning the traditional general term *solatium* in favour of a head of “loss of society and guidance”,<sup>432</sup> but in the event, other than the amounts becoming somewhat larger, no substantive change in the factors taken into account occurred.<sup>433</sup> The award available is available to a range of close relatives and is assessed by the court looking at the matter generally. In England the equivalent awards, introduced originally to the law by statute in the nineteenth century, are described as “bereavement” awards and are of amounts fixed artificially by the current legislation, which have been changed from time to time.<sup>434</sup> They are slightly lower sums than those awarded in Scotland under the broad approach there.

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<sup>424</sup> Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Report 257 (1999)) 3.88.

<sup>425</sup> *Allan v Scott* 1972 SC 59.

<sup>426</sup> Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Report 257 (1999)) 3.88.

<sup>427</sup> *West v Shephard* [1964] A.C. 326 (HL) (England); *Dalgliesh v Glasgow Corporation* 1976 SC 32.

<sup>428</sup> *Dalgliesh v Glasgow Corporation* per LJC Wheatley at 53.

<sup>429</sup> *Heasman v J M Taylor & Partners* [2002] ScotCS 63.

<sup>430</sup> E.g. *Heil v Rankine* [2001] Q.B. 232 where an across the board increase of 20% was declared.

<sup>431</sup> *Heasman v J M Taylor & Partners* (supra) per Lord Coulsfield at [28] – [29].

<sup>432</sup> Damages (Scotland) Act 1976 section 1(4).

<sup>433</sup> *Dingwall v Alexander* 1981 SLT 313 in theory left the matter open owing to different view expressed from the bench on the topic.

<sup>434</sup> Fatal Accidents Act 1976 section 1A(3) as amended by The Damages for Bereavement (Variation of Sum) (England and Wales) Order 2002 SI 2002 No 644.

**(b) Contract law**

**130. Basic situations** In the area of contract law it is much more difficult than in the area of tort law to get a general overview of liability for non-economic loss. Art. 9:501(2) PECL states succinctly: “The loss for which damages are recoverable includes: (a) non-pecuniary loss [...]”. However, that does not really reflect the current legal position in the jurisdictions of the EU. If one looks closer, one has to differentiate between at least three basic situations: (i) liability for disappointed expectations of performance (example: the photographer does not appear to the wedding appointment; the hotel does not live up to the standard promised), (ii) liability for discrimination in the contractual or pre-contractual sphere (example: someone is not taken on as an employee for gender-specific reasons) and (iii) liability for the breach of certain objects of legal protection as a consequence of a breach of contract (example: doctor’s liability for damaging health).

**131. Obstacles to the smooth running of the internal market** The existence of different rules in the area of liability for non-patrimonial loss subject businesses that operate in the European market to very different risks of liability. They are subject to different financial burdens, depending on which legal system applies where they do business.

The following may be mentioned in this context: for example, the fact that it is still the position in some countries that employers, in relation to employees, are liable for accidents at work under the general law of contract or tort. That can give rise to large awards for pain and suffering and also for the bereaved in the event of a fatality (as e.g Spain: Tribunal Supremo 3rd July 2003, RAJ 2003 no. 4323, p. 8119). Constrasting sharply with this is that in some other countries such as Germany employers’ liability for accidents at work has been abolished and replaced with a regime of social insurance. It is a fundamental principle, therefore, that a German employer is liable neither for patrimonial losses nor for non-patrimonial losses. A Spanish business thus operates with respect to its own workforce under a much higher risk of liability than does a German business. That is true, too, even if it is carrying out the same work in a third EU member state. Furthermore, it may be the case that an insurance policy in respect of workplace accidents will not cover the losses which an employee can claim under the general civil law of the place where the accident happened. An instance of this came before the Portuguese Court of Appeal at Evora in a case decided on 15th November 1991 (CJ 1991-5 p. 262). The facts on which this judgment was based suggest it may be presumed that the defendant Portuguese transport company (which in the case before the court was claiming on its accident insurance) was possibly deterred from undertaking transport to Spain precisely because of the unsatisfactory state of its insurance protection. Of course the problem of different levels of protection in respect of non-patrimonial losses, not only affects cases of this type. It also affects a service provider, for example, where the customer’s first priority is the non-economic value to them of these services. For instance, if a wedding is held in the border area between Germany and France and it is sought to have a photographer for the occasion, the organisers should always be advised to choose a French photographer: should the photographs turn out badly (or not be taken at all) he, unlike his

German competitor, would be liable to compensate for non-patrimonial loss (see the discussion below at sections 138 ff).

So far as responses to this aspect of our questionnaire were received from industry and commerce, they informed us that questions of liability for non-economic loss would only be significant from their standpoint in relation to transactions with end consumers and are therefore not relevant to the addressees concerned. The subject of employer liability for accidents at work, which in parts of Europe is still governed by private law, was not taken up.

**132. The Package Travel Directive** In the area of liability for non-performance or unsatisfactory performance of core contractual obligations, a few binding models are already present from European Community law, of which it can be generally said that they reflect positively towards the compensatability of non-material damage in contract law. The most important example is provided by art. 5 of the Package Travel Directive.<sup>435</sup> This compensation claim, as has in the meantime also been expressly confirmed by the ECJ, covers not only compensation for non-material damage as a consequence of breaches of contract which lead to damage to health, but also non-material damage as a consequence of holiday pleasure missed-out on.<sup>436</sup>

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<sup>435</sup> Council Directive 90/314/EEC of 13th June 1990 on package travel, package holidays and package tours, OJ 1990 L 158, 59. The text of art. 5 reads, in as far as it is of interest here, as follows: “1. member states shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services. 2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, member states shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because: – the failures which occur in the performance of the contract are attributable to the consumer, – such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable, – such failures are due to a case of force majeure such as that defined in Art. 4 (6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall. [...] In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the member states may allow compensation to be limited in accordance with the international conventions governing such services. In the matter of *damage other than personal injury* resulting from the non-performance or improper performance of the services involved in the package, the member states may allow compensation to be limited under the contract. Such limitation shall not be unreasonable. 3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2. 4. [...]” (Italics added).

<sup>436</sup> ECJ 12th March 2002, C-168/00, *Simone Leitner v. TUI Deutschland GmbH & Co KG*, ECR 2002, I-2631 = ZVR 2002, 241; see on this *Margit Maria Karollus*, *Entgangene Urlaubsfreude*

The decision in the case of *Leitner* concerned an Austrian family who booked and began a fifteen day package holiday in a Turkish holiday club, the booking having been made with a German tour operator. There they suffered salmonella poisoning which had been caused by a meal served in the club. The whole holiday was spoiled for the family. With the consideration that different rules on the compensability of non-material damage could lead to different financial burdens for the tour operator and consequently to distortions of competition, the ECJ based its decision on a wide definition of damage. Therefore it also includes non-material damage, and as already appeared from the text of the Directive, not only non-material damage in the form of injuries to body or health, but also non-material damage in the form of holiday pleasure missed-out on.

**133. National implementation** The Package Travel Directive has already been implemented into most of the legal systems of the European Union, legally corresponding with the case law of the ECJ already mentioned.<sup>437</sup> This applies, for example, for Germany (§ 651 f BGB), Sweden (§ 14 package tour law (*lag om paketresor*))<sup>438</sup> and Denmark (§ 21 package tour law (*lov om pakkerejser*)).<sup>439</sup> Up until the decision of the ECJ in the case of *Leitner*, in some countries the legal situation is or was, however, rather unclear. Besides Italy,<sup>440</sup> Austria belongs to this group (the decision of the ECJ was issued from the submission by LG Linz) as well as Finland. §§ 23 ff of the Finnish *lag om paketresor*<sup>441</sup> at any rate do not expressly mention non-material damage. Portugal implemented the Package Travel Directive for the first time with the decree (*Decreto-Lei*) no. 198/93 of the 27th May 1993, but this was reversed with Decreto-Lei no. 209/97 of the 13th August 1997, and finally replaced with decree no. 12/99 of the 11th January 1999 on *agências de viagem e turismo*. Art. 41 (2) lit. c of this decree provides for the compensation of material and non-material damage to customers and third parties having been caused by acts or omissions of the tour operator or its representatives. Spain has a multi-act piece of implementing legislation.<sup>442</sup> In arts. 11-13 of the law 21/95 from the 6th July 1995 on

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und Reisen “à la carte” – Zwei EuGH-Entscheidungen zur Pauschalreise-Richtlinie, JBl 2002, 566-578.

<sup>437</sup> Complete, but not always up to date list of the national implementation laws on the internet under: [http://europa.eu.int/celex/cgi/sga\\_rqst?SESS=17455!CTXT=7!UNIQ=6!APPLIC=celexext!FILE=VISU\\_viana\\_7\\_0\\_1!DGP=0!MNELK&mnlink=390L0314#PT](http://europa.eu.int/celex/cgi/sga_rqst?SESS=17455!CTXT=7!UNIQ=6!APPLIC=celexext!FILE=VISU_viana_7_0_1!DGP=0!MNELK&mnlink=390L0314#PT).

<sup>438</sup> SFS 1992:1672.

<sup>439</sup> Of 30th June 1993 no. 472.

<sup>440</sup> In Italian legal literature (*Cavallaro*, Prassi applicativa e sistema nel “danno da vacanza rovinata”, Rass. dir. civ. 2002, 44) has indeed already been proposed art. 13 (2) of the Italian implementing law no. 111 from the 17th March 1995 to be interpreted that it also covers non-economic loss, but due to the lack of appellate case law one can not be certain, that this would also be agreed with in practice.

<sup>441</sup> Of 28th November 1994/1079.

<sup>442</sup> Namely (1.) Ley número 21/95 de 06/07/1995, reguladora de los Viajes Combinados, BOE no. 161 of 7th July 1995, p. 20652 (Marginal 16379), (2.) Real Decreto número 271/88 of 25th March 1988, por el que se regula el ejercicio de las actividades propias de las Agencias de Viajes, BOE número 76 of 29th March 1988, (3.) Orders of 14th April 1988, por la que se

the regulation of package tours, the contractual liability of the organiser and of the travel agent is regulated. These articles are silent on the question of the compensability of non-material damage, but the question is answered in the positive in the case law of the appeal courts.<sup>443</sup> These judgments are based, amongst other areas, on the case law of the *Tribunal Supremo*, according to which contractual liability also recognizes very generally a responsibility for non-material damage.

134. **Discrimination in employment law** Community legislation furthermore exists for the prevention of gender-specific discrimination in employment law. In this respect firstly Council Directive 76/207/EEC of 9th February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,<sup>444</sup> is to be referred to. This Directive against gender-specific discrimination has in the meantime been supplemented through Council Directive 2000/43/EC of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,<sup>445</sup> which had to be implemented by July 2003, through Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation<sup>446</sup> and through Directive 2002/73/EC of the European Parliament and of the Council of 23rd September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.<sup>447</sup> In Art. 15 of the Directive 2000/43 it is demanded in respect of compensation law, that “the sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.” Art. 17 of Directive 2000/78 contains an almost identical provision, and the corresponding provision in Directive 2002/73 (art. 6(2)) reads: “member states shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the member states so determine for the loss and damage sustained by a person injured as a result of discrimination ... in a way which is dissuasive and proportionate to the damage suffered...”. “Effective and dissuasive” in the sense of this measure may only be compensation if it includes compensation for non-economic damage.

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apueban las normas reguladoras de las Agencias de Viajes, BOE número 97 of 22nd April 1988, (4.) Decreto número 43/95 of 6th April 1995, de Reglamento de Agencias de Viajes de la Comunidad Autónoma de las Islas Baleares, Boletín Oficial de la Comunidad Autónoma de las Islas Baleares número 61 of 13th May 1995, p. 5021 (repealed by Decreto no. 60/97 of 7th May 1997, BOCAIB no. 63, 24th May 1997) and (5.) Decreto número 168/94 of 30th March 1994, de reglamentación de las agencias de viajes de la Comunidad de Catalunya, Diario Oficial de la Generalitat de Catalunya número 1924 of 22nd July 1994, p. 5061.

<sup>443</sup> SAP Badajoz 6th September 1995, AC 1995\1727; SAP Asturias 25th September 2001, AC 2001\1943; SAP Vizcaya 22nd January 2001, AC 2001\125.

<sup>444</sup> OJ L 39 of 14th February 1976, p. 40.

<sup>445</sup> OJ L 180 of 19th July 2000, p. 22.

<sup>446</sup> OJ L 303 of 2nd December 2000, p. 16.

<sup>447</sup> OJ L 269 of 5th October 2002, p. 15.

**135. National implementation** In front of the background of this European law-making, extensive national legislative activity took place which concerned itself with a variety of aspects of the discrimination problem. Due to its plentitude it could only be covered in a specific study. The German legislator inserted particular compensation rules with respect to non-material damage by § 611a (2) and (3) into the BGB. An extensive law on the prevention of discrimination in the civil law is being prepared,<sup>448</sup> but has not yet been passed. In Dutch law it is accepted that certain discriminating acts of an employer could represent a tort in the sense of art. 6:162 BW.<sup>449</sup> It is furthermore to be pointed out that an employer under art. 7:611 BW is generally forced to carry out a high standard of care and welfare. If the employer breaches this standard, it can create liability for material as well as non-material damage, the latter in particular also in the case of objectively unjustified terminations of employment.<sup>450</sup> An actual financial loss is not a requisite;<sup>451</sup> compensation is also due if the employee finds a new position straight away.<sup>452</sup> For Italian law arts. 15 and 16 of the *Statuto dei lavoratori* (L. 20th May 1970, no. 300) are referred to, and furthermore art. 15 of the law on equality of treatment in the area of work (L. 9th December 1977, no. 903). The *Corte di Cassazione* decided that contractual as well as non-contractual claims could be enforced against discriminating acts. Even if the plaintiff decides upon the contractual claim, he can demand compensation for the damage suffered.<sup>453</sup> The problem of discrimination caused a lot of legislative activity in Sweden and it is also discussed in detail in Austria, admittedly in front of a partly different legal background.

**136. Sweden** Swedish law even criminalizes certain forms of discrimination in chap. 16 § 9 of its penal code [*brottsbalk* (1962:700)]. A distinctive system of ombudsmen serves the protection of particular employees. It is supplemented by numerous employment law regulations which grant employees claims to “compensation for injury to one’s feelings”, amongst which are §§ 12-15 of the law on the prohibition of discrimination of disabled persons in working life [*lag* (1999:132) *om förbud mot diskriminering i arbetslivet av personer med funktionshinder*], §§ 11-14 of the law on the prohibition in working life of persons due to their sexual orientation [*lag* (1999:133) *om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*], § 7 (1) of the law on the prohibition of discrimination of part-time employees and employees with positions of limited duration [*lag* (2002:293) *om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning*], §§ 16-19 of the law on measures against ethnic discrimination in working life [*lag* (1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet*] and §§ 25, 27 and 27a of the equality law [*jämställdhetslag* (1991:433)]. For the implementation of Directive 2000/43, in the Swedish Proposition 2002/03:65 the introduction of a new “discrimination prohibition law” is proposed.

<sup>448</sup> <http://www.bmj.bund.de/images/11312.pdf>.

<sup>449</sup> H.R. 3rd December 1999, NJ 2000, 235.

<sup>450</sup> H.R. 20th March 1992, NJ 1992, 495, H.R. 3rd September 1993, NJ 1993, 715.

<sup>451</sup> H.R. 3rd September 1993, NJ 1993, 715.

<sup>452</sup> H.R. 17th October 1997, NJ 1997, 266.

<sup>453</sup> Cass. 8th July 2002, n. 9877, [www.Legge-e-giustizia.it](http://www.Legge-e-giustizia.it).

137. **Austria** In Austrian legal literature it is insistently emphasized that discrimination is intended to arouse fear, grief, uneasiness, disgust or a lack of well-being. Compensation for such damage to feelings can enter the equation if the causer of the damage directly aims at causing non-material damage.<sup>454</sup> A substantial problem is contained within § 1330 ABGB, however, which excludes the compensation of non-material damage for breaches of honour. A breach of the personality right to honour protected in § 16 ABGB only gives rise to a claim for compensation for non-material damage if human dignity is concerned.<sup>455</sup> For the remainder, however, the problem of discrimination is concentrated in employment law in Austria. According to academia and case law, the employer has a duty to treat employees equally. The employer is barred from treating individual employees, arbitrarily or for irrelevant reasons, worse than the others.<sup>456</sup> No general duty to treat people equally exists, however. The employee is entitled to a claim to not be ignored for reasons which are forbidden by the legislator, however. In cases of a breach of this, he is entitled to compensation claims (even if he is not entitled to performance claims).<sup>457</sup> Material damage is to be compensated if the plaintiff can prove the causation of the discrimination. He has to show accordingly, that he was the best-qualified candidate and that without the discrimination he would certainly have been taken into consideration. Peculiarities apply for discrimination on the grounds of gender. It is statutorily forbidden.<sup>458</sup> The plaintiff merely has to make the discrimination believable, then it is the job of the defendant to exonerate himself.<sup>459</sup> The law grants a non-fault-based<sup>460</sup> compensation claim in the amount of a certain number of month's salary.<sup>461</sup> Likewise, sexual harassment by the employer and the omission of adequate remedial action against sexual harassment by a third party, fall under the equal treatment law.<sup>462</sup> Art. 1 § 2 (1) b *Gleichbehandlungsgesetz* establishes the connection to human dignity; art. 1 § 2a (7) *Gleichbehandlungsgesetz* also grants correspondingly a compensation claim in respect of non-material damage.<sup>463</sup> An analogous application of this regulation to other cases of discrimination in working life, is admittedly rejected.<sup>464</sup>

138. **The autonomous contract law of the member states** The tendency gradually emerging in EU Community law to compensate for non-economic loss in contract law

<sup>454</sup> Koziol, *Haftpflichtrecht* I<sup>3</sup> (1997), Nr. 11/10.

<sup>455</sup> Aicher in Rummel-ABGB I<sup>3</sup> (2000) § 16 no. 18.

<sup>456</sup> OGH 5th December 1990 SZ 63/218.

<sup>457</sup> OGH loc.cit.

<sup>458</sup> § 2 (1) *Gleichbehandlungsgesetz*, BGBl 108/1979 altered by BGBl 44/1998.

<sup>459</sup> Art. 1 § 2a (9) *Gleichbehandlungsgesetz*.

<sup>460</sup> Exception: Art. 1 § 2 Abs. 1a no. 3 *Gleichbehandlungsgesetz*. The employer has to culpably refrain from the prevention of sexual harassment by third parties.

<sup>461</sup> Art. 1 § 2a *Gleichbehandlungsgesetz*.

<sup>462</sup> § 2 Abs. 1a *Gleichbehandlungsgesetz*. On questionable systematic classification *Floretta/Spielbüchler/Strasser*, *Arbeitsrecht* I<sup>4</sup> (1998), p. 333.

<sup>463</sup> "Provided the disadvantage does not exist in the form of an economic loss, the employee has a claim, in order to compensate for the disadvantage having come about through the breach of dignity, to reduced compensation, however of at least 363.40 Euros."

<sup>464</sup> *Floretta/Spielbüchler/Strasser*, *Arbeitsrecht* I<sup>4</sup> (1998) 344.

also, is indeed echoed in some, but by no means in all, autonomous contract law regimes of the European Union. Here the tendency is increasingly towards harmonizing contract and tort law regarding compensation for non-material damage. As long as a generous view is taken by the legal system in respect of tort law, it is also generally taken in contract law, and the same applies vice versa. As long as the harmonization itself is only carried out within the national laws of obligations, nothing is gained on a European level, or put differently: again here an area can be seen in which the harmonization of only contract law without the “inclusion” of non-contractual liability law would let down the true modern trend of the national legal systems.

Some legal systems, for instance Italian law and Greek law, have different provisions in the law of contract and the law of tort governing the compensation of non-patrimonial loss. But there are others, for instance those of Germany, France, Belgium, Spain, Austria and Sweden, that no longer make a distinction on this basis (though they still differ greatly from each other with respect to their requirements). Businesses offering services of a type that will probably give rise to non-patrimonial losses if they are rendered defectively or simply fail to be provided at all compete for customers in the European market under starkly different conditions, if one proceeds from the fundamental rule in private international law, in the absence of a choice of law clause in the contract, that such a service provider is liable under the law where it is habitually resident. It follows that it is probable that the like services cannot be offered on the same terms (e.g. as to price), or where they are offered on the same terms the success of that business will be adversely affected in the long term by a competitive disadvantage in the European market.

We did not receive any responses to our questionnaire addressing this point and consequently no concrete confirmation of this thesis.

**139. Belgium and France** Belgian and French law are completely in line with the PECL. From the Belgian doctrine it is pointed out that the contractual obligee is entitled to a claim for reparation of all damage which the debtor has caused through the non-fulfilment of his contractual obligations, including moral damage.<sup>465</sup> In the French legal system, the principle that the *préjudice moral* suffered by the contractual obligee represents compensatable damage, today is not questioned.<sup>466</sup> In principle therefore, there is no difference between contractual and tortious liability.

**140. Spain** This is also the case in Spain. The leading doctrine also assumes the compensatability of *daños morales* for contract law. Art. 1106 CC does not exclude the compensation of such damage.<sup>467</sup> Since the beginning of the 1980's this passes as en-

<sup>465</sup> *van Gerven*, *Verbintenissenrecht* I<sup>6</sup>, 133.

<sup>466</sup> *Malaurie and Aynès*, *Contrats et quasi-contrats*<sup>11</sup>, no. 574 p. 346.

<sup>467</sup> *Cavanillas Múgica and Tapia Fernández*, *La concurrencia de responsabilidad contractual y extracontractual. Tratamiento sustantivo y procesal* (1992) 39; *Lacruz Berdejo*, *Elementos de Derecho Civil*, 2. vol.: *Derecho de Obligaciones*, 1. vol.: *Parte General. Teoría General del Contrato*. (1999, new edition) 209; *de Ángel Yagüez* in *Paz-Ares/Díez-Picazo/Bercovitz and Salvador*, *Comentario del Código Civil*, vol. II<sup>2</sup> (1993) 50.

trenched in Spanish case law also.<sup>468</sup> From more recent times, TS 31st May 2000,<sup>469</sup> for example, is to be referred to. The *Tribunal Supremo* awarded here a passenger *daños morales* against the airline as compensation for a flight delay of eight hours without an excuse, which forced the passenger to stay in the airport for this length of time.

**141. United Kingdom** In the United Kingdom the starting point for consideration of whether damages are available for non-economic loss arising from breach of contract is that damages are not awarded for just the fact of breach of contract nor for mental distress in the form, for example, of anxiety, frustration, disappointment or injury to feelings. But there are exceptions. The House of Lords case that laid down this principle early in the twentieth century<sup>470</sup> rejected the possibility of such damages in a case at common law for unfair dismissal of an employee by an employer in breach of the contract of employment. The rule has recently been confirmed by the House of Lords in that context,<sup>471</sup> and also generally in a case that held that damages of this type are not available in an action for breach of contract by a client against a solicitor who had acted in the purchase of a property for the client.<sup>472</sup> It is clear that, despite some nineteenth century Scottish authority to the opposite effect,<sup>473</sup> the approach is applicable in Scotland as well as England.<sup>474</sup> However, the exceptions to the rule are important and in effect are subsidiary rules allowing damages for non-economic loss if certain requirements are met. These categories can be reconciled with the general rule since it is seen as based on policy to exclude the “floodgates” being opened to too many claims of an indeterminate number and extent.<sup>475</sup> As exceptions founded on this basis it follows that they are not to be seen, as has sometimes been argued, simply as situations where such effects are foreseeable if a particular sort of contract is breached<sup>476</sup> They are exceptions with their own principles. First there is a recognised category of where the contract is of a type that “very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation”,<sup>477</sup> and the breach is one that results in that not occurring. The classic examples recognised (before the EC Directive) included package holiday contracts, as where the facilities contracted for were not available at the holiday resort in question,<sup>478</sup> or where they were significantly below the standard contracted as ones of “the highest amenity.”<sup>479</sup> Similarly such damages have been awarded for breach of a contract to take photographs

<sup>468</sup> T.S. 13th December 1984, RAJ 1984 (2), p. 4817, no. 6111; TS 3rd June 1991, RAJ 1991 (4), p. 6033, no. 4407

<sup>469</sup> RAJ 2000 (3) p. 7797, no. 5089.

<sup>470</sup> *Addis v Gramophone Co Ltd* [1909] A.C. 488.

<sup>471</sup> *Johnson v Unisys Ltd* [2001] UKHL 13.

<sup>472</sup> *Johnson v Gore Wood & Co* [2002] 2 A.C. 1.

<sup>473</sup> *Cameron v Fletcher* (1872) 10 M 301.

<sup>474</sup> Assumed to be so in the leading Contract texts since *Gloag*, Law of Contract (2<sup>nd</sup> ed, 1929) 686-697.

<sup>475</sup> *Watts v Morrow* [1991] 1 W.L.R. 1421 per Bingham L.J. at 1445.

<sup>476</sup> *Farley v Skinner* (No. 2) [2001] UKHL 49; [2002] 2 A.C. 732 per Lord Steyn at [16].

<sup>477</sup> *Watts v Morrow* [1991] 1 W.L.R. 1421 per Bingham L.J. at 1445.

<sup>478</sup> *Jarvis v Swan Tours Ltd* [1973] Q.B. 233.

<sup>479</sup> *Colston v Marshall* 1993 SCLR 43 (Scotland).

at a wedding.<sup>480</sup> Despite in recent cases, maintaining a general principle subject to exceptions in this area the House of Lords has extended the examples of this category of exception to include breach of a building contract to construct a swimming pool at a private house. The contract was described as one “for a pleasurable amenity”.<sup>481</sup> Arguably this extension was made, however, only because in the circumstances of the case the contract breaker would otherwise have escaped all liability since there was no financial loss, the pool as built disconform to contract was of no less value than the one contracted for and just as suitable, and it was a situation where an order requiring it to be changed to that contracted for was not available as unjustifiably economically wasteful. In effect a rather nominal sum was awarded for inconvenience. A further extension of this category is that it has recently been made clear that a case may fall within this exception, even though only an aspect of the contract in question was directed towards pleasure etc.<sup>482</sup> “It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind.”<sup>483</sup> Accordingly a surveyor who in breach of contract failed to advise his client that a property that the client intended to purchase for his retirement was likely to be significantly affected by aircraft noise was liable for damages for non-economic loss. The second type of contract which if breached can result in liability for damages for non-economic loss is a contract the purpose of which is to provide help to relieve an existing state of stress. In one case solicitors who had been engaged by their client to take appropriate steps to get legal protection against a man who was pestering her were accordingly held liable to her. This approach is justified by reference to the foreseeability of distress occurring if the contract is not properly performed.<sup>484</sup> Additionally where a personal injury case is based on breach of contract damages are available exactly as they would be if the case were based on tort or delict. If the relationship between the parties is such that a duty of care would arise for negligence in tort/delict the same approach is taken where the injury is psychiatric as has been applied in one case in England where solicitors acting for a client in a criminal case so conducted his case that such a condition resulted.<sup>485</sup>

**142. Germany** Since the reform of 2002, Germany also belongs to the countries which in the area of liability for non-material damage no longer (as before) differentiate in principle between contractual and tortious liability. The contents of this reform have already been described earlier in this study. Apart from the rules which have come from European Community law, German contract law only recognizes liability for non-material damage in cases of a breach of an object of legal protection named in § 253 (2) BGB. This means, for example, that there is not even compensation for the non-material inequity suffered in the case of the unavailability of a rented holiday home. In such a case the “pre-arranged combination of at least two holiday services” is lacking,

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<sup>480</sup> *Diesen v Sampson* 1971 SLT (Sh Ct) 49 (Scotland).

<sup>481</sup> *Ruxley Electronics Ltd v Forsyth* [1996] A.C. 344.

<sup>482</sup> *Farley v Skinner* (No. 2 [2001] UKHL 49; [2002] 2 A.C. 732.

<sup>483</sup> per Lord Steyn.

<sup>484</sup> *Heywood v Wellers* [1976] Q.B. 466 per James L.J.

<sup>485</sup> *McLoughlin v Grovers* [2001] EWCA Civ 1743; [2002] Q.B. 1312.

and consequently it falls outside of the Package Travel Directive of the EU already mentioned.

143. **Sweden** In Swedish law, the increased overlap of contract and tort law has also stood out for a long time in the area of liability for non-economic loss, through the rules of tort law having also been applied within contractual relationships.<sup>486</sup> A specific regulation on the compensation of non-material damage outside of the mentioned cases (package travel; discrimination) is found in § 38 (2) of the law on the protection of positions of employment [*lag* (1982:80) *om anställningsskydd*]. For the remainder the Swedish Liability Act, according to its chap. 1 § 1 expressly applies for breaches of contract as well as torts committed.

144. **Austria** The same basic phenomenon of the coordination of contractual and non-contractual liability regarding non-economic loss, is also encountered in Austria. Here also, non-material damage, as much in the framework of a pre-contractual, as in the framework of a contractual, obligation, is subject to the same rules as in the non-contractual area.<sup>487</sup> In the case of non-material damage by damage to property § 1331 ABGB applies, in the case of bodily injury, § 1325 ABGB applies.<sup>488</sup> Correspondingly in contract law, damages for pain and suffering are also awarded. If the disappointment of expectations of a service comes about, the claim requires that the consideration to be produced for a fee has a non-pecuniary worth and that the debtor has gross fault.<sup>489</sup> An application of this principle is found in § 8 (3) of the *Mietrechtsgesetz* (concerning the grossly negligent breach of tenancy law caused by the renovation works carried out by the landlord). For the remainder the rule applies, that the obligee does not receive compensation for every injury to feelings, but rather (except cases of bodily injury) only the worth of the particular predilection which the performance had for him, and even this only in the case of malice, malicious glee or the presence of a punishable act on the part of the debtor.

145. **Italy** The legal situation is difficult, and to a certain extent, unclear in Italy. The starting point is the provision of art. 2059 CC, which is today seen as being extraordinarily problematic, and which regulates the compensatability of non-material damage in the area of non-contractual liability, and in this respect orders that non-economic loss is only compensatable if the law expressly provides for it. The consequence was a whole array of problems, amongst which the creation of a completely separate category of damage, namely that of so-called biological damage (*damno biologico*). Its acceptance appeared even to be required constitutionally because the protection of body and health

<sup>486</sup> HD 9 September 1932, NJA 1932 p. 457; HD 14 April 1965, NJA 1965 p. 124; see *Hellner and Johansson*, *Skadeståndsrätt*<sup>6</sup> (2000) 164.

<sup>487</sup> *Koziol*, *Haftpflichtrecht I*<sup>3</sup> (1997) Nr. 11/14 ff, S. 355; also to be observed, however OGH 16. 5. 2001, ZVR 2001/73 note *Kamer*.

<sup>488</sup> See on this § 1325, OGH 12th December 1974, SZ 47/147 (claim for compensation for pain and suffering of a customer against her hairdresser, who against her instructions and therefore in breach of contract, cut her hair).

<sup>489</sup> *Koziol*, loc.cit.

was not sufficiently afforded by art. 2059 CC alone.<sup>490</sup> With regards to contractual liability it is at first noticeable that Italian contract law has absolutely no measures on the compensatability of non-material damage. Its compensatability in a contract law context was therefore always doubtful in cases where the contractual liability did not represent a tort at the same time, which according to art. 2059 CC would grant solatium in the case of a criminal offence (see art. 185 CP).<sup>491</sup> Where this is not the case, the legislative silence seems to imply that for non-material damage compensation is not owed. Art. 1321 CC points in this direction also, whereby a contract merely establishes *un rapporto giuridico patrimoniale*, a patrimonial relationship. Art. 1174 CC on the other hand, makes it clear that an obligation can serve to the protection of non-patrimonial interests. In front of this background it has been argued that there would be no reason to deny the compensatability of non-material damage where the contract is directed at the promotion of the non-material interests of the contracting party.<sup>492</sup> However, a clear confirmation of this thesis has not yet been provided by the case law. With regard to the previously mentioned *danno biologico*, in the legal literature the opinion is represented that it can also be the cause of contractual non-fulfilment, and in this respect it does not have to depend upon the presence of a criminal act.<sup>493</sup> Finally art. 2087 CC is to be referred to, which obliges an employer to take measures which are necessary according to the nature of the work, the experience and the technical knowledge, in order to protect the physical integrity and moral welfare of the employees. *Danno morale* as a consequence of an injury to body or health also belongs to compensatable damage in the sense of this claim, because the conduct of the employer which caused the damage in such a case is relevant in criminal law.<sup>494</sup> *Danno biologico*, on the other hand, is covered by compulsory insurance relating to accidents and illness at work (art. 13 of the law no. 38/2000).

**146. Greece** In Greece, the legal starting point is similar to that in Italy; here, as in Italy, the same discussion is being led. In the case of breaches of contract which do not represent at the same time delictually relevant conduct, art. 932 does not apply. The

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<sup>490</sup> Corte cost. 14th July 1986, n. 184, at no. 15. See also Corte cost. 27th October 1994, no. 373, at no. 1.

<sup>491</sup> If a breach of contract and unallowed conduct occur at the same time, the compensatability of non-material damage scarcely appears to be problematic any more, see *Franzoni*, Dei fatti illeciti, Commentario del codice civile Scialoja Branca, Libro quarto, Delle obbligazioni, arts. 2043-2059 (1981) 1186-1191; *Bonilini*, Il danno non patrimoniale, La responsabilità civile, Una rassegna di dottrina e giurisprudenza diretta da Alpa-Bessone, V (1987) 417-419. A different view, though *De Cupis*, Il danno, Teoria generale della responsabilità civile, I (1979) 127-136. In the case law the topic is scarcely mentioned. Due to the fact that there is a frequent concurrence of actions regarding contractual and tortious liability, for the case law practically no occasion exists to further work further on this question.

<sup>492</sup> *Costanza*, Danno non patrimoniale e responsabilità contrattuale, in Riv. crit. dir. priv. 1987, p. 127 f.

<sup>493</sup> *Bianca*, Diritto civile, 5, La responsabilità (1994) 170-171.

<sup>494</sup> Cass. 22nd March 2002, no. 4129, Giust. civ. Mass. 2002, 501.

non-material damage is not compensatable in such cases due to art. 299 CC.<sup>495</sup> In the Greek legal scholarship, however, there is no lack of voices, as is the case in Italy, which question this legal situation.<sup>496</sup> Thus it is claimed, for example, that non-material damage suffered as a consequence of a breach of contract could be made compensatable by using arts. 57 and 59 CC.<sup>497</sup> These claims, however, provide for the compensation of non-material damage in the case of breaches of rights of personality.

**147. Portugal** The Portuguese CC only deals with *danos não patrimoniais* in the framework of tort law (art. 496 CC), and not in the general regime of the duty to compensate (arts. 562 ff CC). This has led to the question of whether non-economic loss is exclusively compensatable in the area of tort law. This question is answered in the negative by the majority. The case law<sup>498</sup> as well as the predominant academia teachings<sup>499</sup> consider non-economic loss as also being compensatable in contract law. It is even recognized that with damages to reputation (*perda de prestígio ou reputação*), even legal persons are entitled to a contractual claim to compensation for non-economic loss.<sup>500</sup>

### (5.) Aggravated and Exemplary (or Punitive) Damages

**148. Definition** The expressions “aggravated” and “exemplary” damages indeed originate from the English law of torts, but fundamentally describe categories which also appear to be relatively comprehensible in the remaining legal systems of the EU. Aggravated damages are general damages in the sense that they cannot be established by specific proof and therefore have to be quantified by the court. They typically occur in the case of torts involving non-corporeal rights of personality. If these turn out to be perceptible and substantial, which is not seldom the case, then the liability of the tortfeasor is “intensified.” At least following the theoretical concept, they do not exist as punitive damages, but rather (as in compensation for pain and suffering) as compensation. If exemplary (or punitive) damages are awarded, then it is on the contrary, openly admitted that these sums are not to compensate the injured party, but are there to deter the tortfeasor: “The object of exemplary damages is to punish and deter”.<sup>501</sup> In practice of course, the border lines between these two categories can become blurred.<sup>502</sup> This can be

<sup>495</sup> Georgiades/Stathopoulos (-Georgiades), art. 932 no. 7; Georgiades/Stathopoulos (-Stathopoulos), Art. 299 no. 5.

<sup>496</sup> Overview by Georgiades/Stathopoulos (-Georgiades), art. 932 no. 7.

<sup>497</sup> Papaxristou, ToS 1981, S. 52.

<sup>498</sup> See above all STJ 21st March 1995, BolMinJus 445 (1995) 487; further STJ 30th January 1981 BolMinJus 313 (1982) 212 and STJ 4th July 1974, BolMinJus 238 (1974) 204.

<sup>499</sup> Further Menezes Leitão, Obrigações I<sup>3</sup>, 339. Different view, however Antunes Varela, Obrigações em Geral I<sup>10</sup>, 605.

<sup>500</sup> STJ 17.10.1995 (concerning the totally spoiled annual party of a respected commercial company by a catering service); the judgment is available online under: <http://www.dgsi.pt/jstj.nsf/0/CA86A25040BEDE68FC003B1C57>.

<sup>501</sup> *Rookes v Barnard* [1964] A.C. 1129, 1221 (per Lord Devlin).

<sup>502</sup> *Further v Bar*, The Common European Law of Torts I, nos. 605-613.

seen when looking at the amount, as the higher the aggravated damages turn out to be, the more they take on a punitive character.

The European Commission is already aware of the fact that there are many divergences in the law governing aggravated and punitive damages resulting in obstacles to the smooth running of the internal market. In its proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) (see above at paragraph 16) it stated: "These general observations are particularly apt in the case of non-contractual obligations, the importance of which for the internal market is clear from sectorial instruments, in force or in preparation (...) Despite common principles, there are still major divergences between Member States, in particular as regards the following questions: (...) compensation in excess of actual damage sustained (punitive and exemplary damage) (...) During the consultations undertaken by the Commission, several representatives of industry stated that these divergences made it difficult to exercise fundamental freedoms in the internal market" (page 5 of the Explanatory Memorandum).

We received scant response to this issue. One response to our questionnaire which we received on this point was to the effect that there had been little or no experience with punitive damages in Europe. Another response, however, indicated in general terms that punitive damages do constitute a special problem.

**149. Contract and tort law** Aggravated and exemplary (or punitive) damages, in as much as they are awarded at all, have remained until now almost exclusively a phenomenon of non-contractual liability. In contract law naturally the phenomenon of contractual punishment clauses can be found, but a contractual punishment must have been agreed upon between the parties. In some jurisdictions, as in England and Scotland, the power of parties in their contract to agree with legal effect that certain specific sums will be paid on breach, is limited by a rule that if the sum in question is not a reasonable pre-estimate of loss it will be unenforceable as a "penalty clause".<sup>503</sup> "Legislative" contractual punishments generally do not exist. However, the common law may now move to a position where its long-standing recognition of the possibility of exemplary damages within tort law is extended to some cases of breach of contract. Following the recent broadening of the categories in tort law in which exemplary damages may be obtainable,<sup>504</sup> earlier authority<sup>505</sup> that they can never be obtained in cases of breach of contract is now open to question. Accordingly, it has now been noted in academic literature that the rule may in due course be argued to no longer survive.<sup>506</sup> It has already been recognised in Canada that if the breach of contract at the same time takes a form that can be seen as a tort and the situation is one where under the criteria to be applied to tort, exemplary damages are

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<sup>503</sup> *Dunlop Pneumatic Tyre Ltd v New Garage and Motor Co Ltd* [1915] A.C. 79.

<sup>504</sup> *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 A.C. 122 (HL).

<sup>505</sup> *Addis v Gramophone Co Ltd* [1909] A.C. 1129.

<sup>506</sup> E. McKendrick, *Contract Law, Text, Cases and Materials* (2003) 1095.

to be awarded then it is equally so in respect of the breach of contract.<sup>507</sup> It has been argued in the academic literature in England now that the law should go further and rather than encourage claimants to look for a way to show that there was also a tort in a breach of contract case, to recognise the exemplary damages may be awarded in appropriate cases for breach of contract as such.<sup>508</sup> Notwithstanding this, it is thought that it is only on rare occasions that the situation would be one where the behaviour of the defendant in breach would be sufficiently outrageous to call for such an award, particularly as there are now cases where the profit made by the defendant in some situations can be claimed on the ground not of contract, but of restitution<sup>509</sup>, and in such a case the claim for exemplary damages assessed at a higher amount than that would require some very special ground.

**150. Breadth of application** Real punitive damages are a peculiarity of Common Law. In sharp contrast within the United Kingdom itself they are, in recognition of this, decisively rejected in Scots law,<sup>510</sup> which in this respect has stressed the strand of its doctrinal inheritance constituted by the European *ius commune*; based on this, too, Scotland has, though there is little authority considering the idea at all, been held to have rejected the concept of aggravated damages as well.<sup>511</sup> However, aggravated damages, on the other hand, are increasingly found in the remaining jurisdictions of the EU. For this statement it is very important though, that one keeps the differentiation criteria between these two forms of compensation sufficiently strict. The German and the Swedish Supreme Court, for example, recently decided almost simultaneously that “the notion of prevention demands that resultant profits be taken into account in calculating the quantum of damages.”<sup>512</sup> The rulings clearly include elements of private punishment, they could equally have been recognized merely as aggravated and not really as exemplary damages. The same holds true of art. 6:106 (1)(a) Dutch BW, under which “the victim is entitled to such damages as appear equitable if the tortfeasor intentionally inflicted harm of the type sustained.” Thus civil and criminal functions merge wherever the compensation of immaterial losses is intended to give the plaintiff moral satisfaction for the wrong he has suffered.

**151. Common Law** The award of exemplary damages was indeed also criticised in English Common Law. However, they have often been confirmed,<sup>513</sup> and their role has

<sup>507</sup> *Royal Bank of Canada v W Got & Associates Electric Ltd* (2000) 178 D.L.R. (4th) 385 (SCC); *Whiten v Pilot Insurance Co* [2002] SCC 18. (See also *J Edelman, Gain-Based Damages* (2002) 251 and *J Edelman, Exemplary Damages for Breach of Contract* (2001) 117 L.Q. Rev. 19.

<sup>508</sup> *E. McKendrick* (supra) 1096.

<sup>509</sup> *Attorney-General v Blake* [2001] 1 A.C. 268 (HL).

<sup>510</sup> *Black v N B Railway Co* 1908 SC 4444 per Lord President Dunedin at 4553.

<sup>511</sup> *D. Watt (Shetland) v Reid* (EAT 25 September 2001) EAT 424/01 per Lord Johnston at [7].

<sup>512</sup> BGH 15th November 1994, NJW 1995 p. 861. Almost identical considerations obtained in Swedish HD 16th November 1994, NJA 1994:115 (pp. 637, 649): the economics of press publications must also be considered: damages should be high enough to have a deterrent effect.

<sup>513</sup> *Esp. in Cassell & Co. Ltd. v. Broom* [1972] A.C. 1027 (HL).

now been decisively reaffirmed,<sup>514</sup> as it has likewise recently been, for instance, in Canada.<sup>515</sup> In the course of this reaffirmation in England, which has been underpinned by a new tendency to emphasise that tort law has functions other than compensation,<sup>516</sup> there has developed some uncertainty as to how far the criteria may have been made more general than they had been as formulated in *Rookes v Barnard*,<sup>517</sup> which had previously been taken as definitive of the question. A recent first instance decision,<sup>518</sup> has noted this new uncertainty,<sup>519</sup> but has taken the position now to be summed up in three propositions: “The first is that the question whether or not to award exemplary damages should be determined more by reference to the nature of the behaviour complained of than by reference to the nature of cause of action to which that behaviour has given rise. The second is that a powerful case can be made that such damages should be considered where, and perhaps only where, the behaviour complained of gives rise to a sense of outrage ... The third is that a recognised category in which such damages may be awarded is where damages on an ordinary compensatory basis can be seen not to be sufficient to do justice.” The first of these propositions underlines that an earlier limitation of the role of exemplary damages to torts in respect of which both (2) prior to *Rookes v Barnard* there was authority for their potential availability, and (b) the liability was personal and not vicarious is no longer the law. Statements to the opposite effect in *Rookes v Barnard* itself are considered to have been misunderstood<sup>520</sup> and, in any event, such a limitation is to be rejected as irrational and illogical<sup>521</sup> The second proposition indicates that the key issue is the sense of outrage. The third proposition comprehends situations where the tortfeasor intended to profit, but it is now seen as capable of applying more widely. The approach summed up in these two last propositions can be seen as generalising from what was laid down in *Rookes v Barnard* itself, namely that exemplary should be awarded in three<sup>522</sup> classes of cases.<sup>523</sup> The first class of cases involves statutory authority,<sup>524</sup> the second where a government authority has displayed

<sup>514</sup> *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 (HL).

<sup>515</sup> *Royal Bank of Canada v W Got & Associates Electric Ltd* (2000) 178 D.L.R. (4th) 385 (SCC) See also *J Edelman*, *Gain-Based Damages* (2002) 16.

<sup>516</sup> Influential for example now also in the extension of this situations where an employer is seen as vicariously liable because a tort is committed within the the scope of an torious employee’s employment.

<sup>517</sup> [1964] A.C. 1129, 1221.

<sup>518</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch) per Lindsay J at [272].

<sup>519</sup> “The law was not as fully explored [in *Kuddus v Chief Constable of Leicestershire Constabulary*] as it might have been” (ibid per Lindsay J at [272].

<sup>520</sup> *Kuddus v Chief Constable of Leicestershire Constabulary* (above) per Lord Slynn at 1796, Lord Mackay at 1802 and Lord Hutton at 1815.

<sup>521</sup> Ibid and per Lord Nicholls at 1805-1807.

<sup>522</sup> The rules in *Rookes v Barnard* appear not to have become established law in Ireland: White, *ILT* 1987 pp. 60, 63-65. The case was not quoted in *Maher v Collins* [1975] I.R. 232 (Sup. Ct.) which decided that adultery (then an offence) was no basis for awarding punitive damages.

<sup>523</sup> See Lord Denning in *Broom v Cassell & Co. Ltd.* [1971] 2 Q.B. 354, 380-381 (CA).

<sup>524</sup> Cf. sec. 13(2) Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 (c. 65) (special case of conversion).

‘oppressive, arbitrary or unconstitutional behaviour’, and the third where the defendant had calculated before acting that his profit would exceed the compensatory damages he would have to pay. Applying the new focus on the behaviour of the defendant rather than the nature of the cause of action it follows that exemplary damages are not only potentially available, as had previously been recognised, for example in cases of intentional trespass to the person, trespass to property, defamation and deceit, but also for instance in cases of misfeasance in public office<sup>525</sup> and in a case of breach of confidence.<sup>526</sup> An earlier view that they could not be awarded in, for instance, nuisance cases must now be seen as incorrect.<sup>527</sup> Today, though, the question discussed, is whether and under which additional requirements a claim for exemplary damages is considered in the area of negligence liability.<sup>528</sup> The English Law Commission has suggested that such punitive damages are only to be awarded in cases of negligence, if they involve “deliberate and outrageous disregard of the plaintiff’s rights”.<sup>529</sup> The Irish Law Reform Commission recommended a test defined in legislation as “high-handed, insolent, vindictive or exhibiting gross disregard for the rights of the plaintiff”.<sup>530</sup> Another open question now is whether exemplary damages are ever available where the tortfeasor has been sentenced by a criminal court in respect of the behaviour that gives rise to the civil claim. In one first instance case the principle was applied that nobody should be punished twice for the same action to the effect that exemplary damages were not available in a case of deceit against a defendant imprisoned for the fraud.<sup>531</sup>

**152. France and Belgium** The continental European and Scandinavian legal systems fundamentally decline, as has already been noted, to openly accept real punitive damages. In the French as well as in the Belgian legal systems, for example, the principle applies, that a person who is liable does not have to compensate for more than the damage caused.<sup>532</sup> In French legal literature it is pointed out, however, that the principle is weakened by the fact that the quantification of the amount of compensation is a matter for the discretionary judgment of the court. In particular, so it is said, the courts occasionally use their *pouvoir souverain d’appréciation*, in order to estimate the scope of damage as particularly broad in the case of a very serious *faute*.<sup>533</sup> That can not be openly

<sup>525</sup> *Kuddus v Chief Constable of Leicestershire Constabulary* (above).

<sup>526</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch) per Lindsay J at [272].

<sup>527</sup> C. f. *A.B. and Others v South West Water Services Ltd.* [1993] 1 All ER 609 (CA) (which was in fact not a case of “private nuisance” anyway, but one of “public nuisance” and breach of statutory duty).

<sup>528</sup> On *A v. Bottrill* [2002] 3 W.L.R. 1406 (P.C.), a decision by the Privy Council using New Zealand law, see the analysis of Manning, L.Q. Rev. 119 (2003) 24-28.

<sup>529</sup> Aggravated, Exemplary and Restitutionary Damages, Law Com. no. 247 (1997) 110-111.

<sup>530</sup> Report on Exemplary damages (May 2000), 23.

<sup>531</sup> *Archer v. Brown* [1984] 2 All ER 267 (Pain, J).

<sup>532</sup> See for France Cass.civ. 9th July 1981, Bull. Civ. 1981, II, no. 156 p. 101 («Le propre de la responsabilité civile est de rétablir aussi exactement que possible l’équilibre détruit par le dommage et de replacer la victime dans la situation où elle se serait trouvée si l’acte dommageable ne s’était pas produit») and for Belgium *Simoens, Schade en schadeloosstelling*, no. 10 p. 22.

<sup>533</sup> *Malaurie and Aynès, Responsabilité délictuelle*<sup>11</sup>, no. 240 p. 137.

given as a reason, however; the judgment would otherwise be squashed on appeal to the *Cour de Cassation*.<sup>534</sup> Examples for clear increased compensation obligations are found in cases of breach of rights of personality. Here the courts can use their judgment to compensate non-material damage with drastic sums.

One example amongst many is provided by the CA Paris from the 4th January 1988.<sup>535</sup> It involved the publication of naked pictures of a famous person in the magazine *Courrier du Coeur*. The photos of the plaintiff were taken in a private capacity when she was 18 years old; they were later published without her consent. The court awarded damages of 250 000 *francs* and based this sum on the one hand with the gravity of the damage, and on the other, with the pursuit of profit of the defendant. In French legal literature it is said that decisions of this type are also aimed at being a deterrent and punishment.<sup>536</sup>

153. **Astreinte** The *astreinte*, too, shows characteristics of a private punishment in the opinion of the French academia.<sup>537</sup> The *astreinte* is a type of coercive enforcement penalty which is ordered by a judge in order to overcome the opposition of the person judged, if this person does not fulfil the duties imposed upon them in the judgment. In practice the *astreinte* takes the form of a sum of money which the debtor has to pay to the obligee, if the debtor does not carry out the judgment enacted against him.<sup>538</sup>

154. **Portugal** The “*astreinte*” developed by the French case law was taken into Portuguese law in 1983 with the Decreto-Lei No. 262/83 as “*sanção pecuniária compulsória*” in art. 829-A CC,<sup>539</sup> although with the variation that 50% of the sum owed is to be paid to the state (art. 829-A (3) CC). This *sanção pecuniária compulsória* can be judged in addition to the sum which is payable under a contractual penalty clause (*cláusula penal*).<sup>540</sup> Its sanctioning function is fundamentally recognized for the area of non-contractual liability.<sup>541</sup> It is expressed in the reduction clause of art. 494 CC, it reads: “If the liability is based on negligence, the duty to compensate can be fixed according to equitable discretion as a lesser amount than that of the damage caused, as long as the degree of fault of the tortfeasor, his own economic situation and that of the injured party and other circumstances of the case justify this.” In the case of intention a reduction in liability is ruled out. For the remainder non-contractual liability is limited to the compensation of loss suffered (art. 566 (2) CC). A sanctioning function admittedly attaches

<sup>534</sup> Cass.civ. 8th May 1964, Bull. Civ. 1964, II, no. 358 p. 269 («L'indemnité nécessaire pour compenser un préjudice subi doit être calculée en fonction de la valeur du dommage, sans que la gravité de la faute puisse avoir aucune influence sur le montant de ladite indemnité »)

<sup>535</sup> D. 1989 som., p. 92, obs. Daniel Amson.

<sup>536</sup> *Carval*, La responsabilité civile dans sa fonction de peine privée (1995), no. 29 p. 31-32.

<sup>537</sup> *Terré/Simler/Lequette*, Les obligations<sup>8</sup>, no. 1122 p. 1046-1047.

<sup>538</sup> *le Tourneau/Cadiet*, Droit de la responsabilité et des contrats (2000/2001), no. 2584.

<sup>539</sup> *Further Calvão da Silva*, Sanção pecuniária compulsória (Artigo 829º-A do Código Civil), BolMinJus 359 (1986) 39-126 and *Almeida Costa*, Obrigações<sup>9</sup>, 991.

<sup>540</sup> STJ 3rd November 1983 BolMinJus 331 (1983).

<sup>541</sup> *Galvão Telles*, Obrigações<sup>7</sup>, 387.

importance to arts. 496 (3) and 494 CC, which regulate the allocation factors for the determining of the amount of compensation for non-economic loss. This deals at the same time with compensation (*compensação*) and redress (*desagravo*).<sup>542</sup>

**155. Italy** Italian law also has as its starting point the principle that compensation for property damage requires an economic loss.<sup>543</sup> Punitive damages are therefore fundamentally unrecognized. It is to be pointed out, though, firstly in art. 96 (1) CPC, whereby a party defeated in a court case can be judged to compensate at the request of the other party, if the defeated party sued or let himself get involved in a trial in bad faith or with gross negligence. The case law recognizes in this, in relation to art. 2043 CC, independent grounds for liability.<sup>544</sup> The claim for compensation has its basis solely in the dishonest conduct of the suing party.<sup>545</sup> And secondly it is to be remembered that in the case law occasional explicit reference is made to the *funzione punitiva* of the *danno morale* which, in respect of injury to a person's dignity, is only satisfied if the anticipated or actual profit for the defendant is considered in the calculation of damages.<sup>546</sup> Indeed, one judgment based its compensation awarded on the tariff set by the criminal law.<sup>547</sup>

**156. Spain** In Spain the penal function of tort law is likewise fundamentally rejected. As grounds for this, the constitutional guarantee of a criminal procedure for penal cases is referred to. It is further referred to on this point that tort law can not have the purpose of organizing an unjustified enrichment for the victim.<sup>548</sup> The beginnings of aggravated or even punitive damages are seen by the academia in art. 9 (3) of the *Ley Orgánica 1/1982, de 5 de Mayo, de Protección Civil del Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen* (BOE no. 115 of the 14th May)<sup>549</sup> already mentioned several times in this study. Following this measure the compensation extends, however, to cover non-material damage which is to be valued corresponding to the circumstances of the case and the gravity of the actual damage caused. This possibly permits aggravated damages, but not however real punitive damages.<sup>550</sup>

**157. Austria** After § 1324 of the Austrian ABGB the extent of the duty to compensate points towards the "lost profit and the repayment of the offence caused" only being owed in cases of "wicked intention" or "noticeable lack of care." Therefore, as the leading

<sup>542</sup> Menezes Leitão, *Obrigações* P, 339. See further Sousa Dinis, *Dano corporal em acidentes de viação*, CJ(ST) V (1997-2) p. 11, 17.

<sup>543</sup> *Salvi*, *Il danno extracontrattuale, Modelli e funzioni* (1985) 92.

<sup>544</sup> Cass. 7 May 1998, n. 4624, *Foro it.* 1999, I, 1288.

<sup>545</sup> [www.dannipunitivi.com/fr\\_index.htm](http://www.dannipunitivi.com/fr_index.htm).

<sup>546</sup> CA Rome 5th November 1990, *Dir.inf.* 1991 p. 845. Cf. *Trib. Monza* 26 Mar. 1990, *Foro it.* 1991, I, 2862.

<sup>547</sup> *Pret. Monza* 19 December 1992, *Foro it.* 1994, I, 2291.

<sup>548</sup> *de Ángel Yáñez*, *Tratado de Responsabilidad civil*<sup>3</sup> (1993) 60; *Díez-Picazo*, *Derecho de daños* (1999) 46.

<sup>549</sup> *Luis Díez-Picazo loc.cit.*

<sup>550</sup> *Pantaleón Prieto* in *Paz-Ares/Díez-Picazo/Bercovitz/Salvador, Comentario del Código Civil*, vol. II<sup>2</sup> (1993) 1972.

academics state, now as before, the ABGB in no way mixes compensation and punishment. The law only involves the compensation of damage caused.<sup>551</sup> The general tendency of European tort laws in the calculation of damage, to take into account advantages which the tortfeasor made in his dealings, can now also be observed in Austria.<sup>552</sup> A penal element may moreover to some extent be contained in § 6 (1) of the Media Law. The provision concerns the claim for compensation following a breach of rights of personality through the media and names criteria for its calculation including the type and extent of the circulation of the medium and numerically fixed highest sums.

158. **Greece** Also in Greece the view prevails, that the aim of compensation and compensation for pain and suffering is the redress of damage suffered; the duty to compensate has no penal character.<sup>553</sup> The notion of sanctions is not a feature of civil law because this is geared towards the injured party and not the tortfeasor. As a result the gravity of fault plays no role in the determination of the extent of the duty to compensate.<sup>554</sup> The damage suffered represents the limit of the compensation to be given, because otherwise it would result in an unjustified enrichment of the injured party.<sup>555</sup> Despite these reservations, in the last few years the number of laws has fundamentally risen, in which the thought of sanctions has made an entry into compensation law. Recent Greek legal literature<sup>556</sup> refers for example to law 1178/1981 (changed by law 2243/1994), which has introduced a minimum amount (!) for the sum of compensation for breaches of rights of personality, it further refers to law 2123/1993 on intellectual property, whereby the compensation owed is at least double the licence fee, which would have to be paid with the lawful application of the respective laws. Even more important, however, is art. 10 (9)(b) of the consumer protection law 2251/1994. There it is provided for, that with the calculation of non-material compensation, points relating to deterrence and prevention are also to be taken into account. The motives for this law refer expressly to punitive damages in Anglo-saxon law. Moreover, it has recently been clarified, that the recognition of foreign punitive damages awards in Greece is only excluded due to a violation of the *ordre public*, if they turn out to be disproportionately high.<sup>557</sup>

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<sup>551</sup> Koziol, *Haftpflichtrecht I*<sup>3</sup> (1997), no. 1/17, p. 11.

<sup>552</sup> Koziol, *Die Bereicherung des Schädigers als schadenersatzrechtliches Zurechnungselement*, in FS Bydlinski (2002) 175-195.

<sup>553</sup> Georgiades/Stathopoulos (-Stathopoulos), Arts. 297-298, no. 4; Georgiades, *Enochiko Dikaio-Geniko meros* 132.

<sup>554</sup> Georgiades/Stathopoulos (-Stathopoulos), Arts. 297-298, nos. 3-4.

<sup>555</sup> Stathopoulos loc.cit.

<sup>556</sup> Panagopoulos, *Punitive damages ("poiniki aposimiosi") kai elliniki dimosia taxi*, KritE 2000, 195, 224 ff; Nikolaides, *Antithesi i mi stin elliniki dimosia taxi tis aposimiosis me kyrotiko skopo*, KritE 2000, 318, 325 ff.

<sup>557</sup> Agreeing with the recent case law of the Aeropagis on this question amongst others Nikolaides and Panagopoulos loc.cit.

159. **Germany** German tort law serves the safeguarding of legally protected interests, and not the punishment of the tortfeasor.<sup>558</sup> Indeed prevention and redress belong to the objectives of German liability law. However, these are only exceptionally of importance in compensation law.<sup>559</sup> This is due to the fact that even in the case of a claim for compensation for pain and suffering, the compensating function is at the fore; the thought of redress only comes into the equation later.<sup>560</sup> In the case of serious, deliberate and commercialised intrusions into general rights of personality, the amount of financial compensation is orientated at the commercially achieved profit which caused the damage.<sup>561</sup> In the case of compensation due to a breach of general rights of personality, following the case law of the BGH,<sup>562</sup> it does not involve compensation for pain and suffering in its actual sense, but rather it involves legal redress which goes back to the protective orders from arts. 1 and 2 (1) of the constitution.<sup>563</sup> Allowing monetary compensation is based on the thought that without such a claim, breaches of the dignity and honour of people would often remain without sanction with the consequence that legal protection of personality would die. In contrast to a claim for pain and suffering, with a claim for compensation due to a breach of general rights of personality, the point of redress for the victim is at the fore.<sup>564</sup> Furthermore, legal redress should serve the purpose of prevention.<sup>565</sup> The BGH has made it clear that a judgment to pay compensation is only appropriate for achieving the purpose of prevention, as required by the law on rights of personality, if the scale of compensation constitutes a counterweight to the fact that the rights of personality had been infringed for the purpose of obtaining profit. That does not mean, however, that in such cases ruthless commercialisation of personality is to carry out a “siphoning off of profits”, but rather that the achieving of profit from a breach of law is to be included as a factor in the calculation for the decision on the amount of compensation. A real restraining effect therefore has to come from the level of compensation. As a further factor in calculation, the intensity of the breach of personality law can be taken into account.<sup>566</sup> In the case law of the BGH the allowing of punitive damages is incompatible with the fundamental idea of German law.<sup>567</sup> Indeed, with the legal institution of contractual penalties (§§ 339 ff BGB), German law permits to a certain extent a punitive function in private law. This requires, however, a corresponding contractual agreement between the two parties and is therefore meaningless for tort

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<sup>558</sup> MünchKomm-Mertens, BGB<sup>3</sup>, Introduction to §§ 823-853, no. 41.

<sup>559</sup> Palandt-Heinrichs, BGB<sup>62</sup>, Introduction to § 249, no. 4.

<sup>560</sup> BGH 6th July 1955, BGHZ 18, 149, 154.

<sup>561</sup> BGH 15th November 1994, BGHZ 128, 1 = NJW 1995, 861 and BGH 5th December 1995, NJW 1996, 984 (*Caroline von Monaco*).

<sup>562</sup> BGH 15th November 1994, NJW 1995, 861, 864.

<sup>563</sup> BVerfG 14th February 1973, BVerfGE 34, 269, 282, 292 = NJW 1973, 1221, 1223, 1226 (*Soraya*).

<sup>564</sup> BGH 15th November 1994, NJW 1995, 861, 865; BGH 19th September 1961, BGHZ 35, 363, 369; BGH 5th March 1963, BGHZ 39, 124, 133.

<sup>565</sup> BGH 15th November 1994, NJW 1995, 861, 865; BGH 22nd January 1985, NJW 1985, 1617.

<sup>566</sup> BGH 15th November 1994, NJW 1995, 861, 865.

<sup>567</sup> BGH 4th June 1992, BGHZ 118, 312, 339.

law.<sup>568</sup> In the case of the breach of non-discrimination relating to gender, a compensation claim exists (as already shown) under § 611a (2) and (3) BGB, which following the case law of the ECJ<sup>569</sup> should have a deterrent effect. Here the view is represented, that the claim is getting closer to punitive damages, but it is still in accordance with the system of German compensation law.<sup>570</sup>

160. **Scandinavia.** In Swedish law punitive damages are likewise almost completely unknown. One of the few exceptions is found in HD 16th November 1994.<sup>571</sup> A magazine published a montage of photos, in which the heads of prominent people were copied onto pornographic picture sequences. The publisher was ordered to pay generous compensation for insult. According to the court, “in consideration of the character of the criminal offence committed and the economic considerations which prompted the publishing, [there were] reasons to quantify the compensation so high that it could also have a deterrent effect.”<sup>572</sup> Very similar tendencies can be found in the Danish case law. HD of the 16th April 1985<sup>573</sup> concerned a men’s magazine which published topless photos of a well-known Danish singer. The photos were secret and taken without the consent of the plaintiff. The court took into consideration the magazine’s pursuit of profit, among other things, when determining the amount of compensation, but said at the same time that the pictures were only harmful due to the circumstances in which they were taken.

## (6.) Recovery of Pure Economic Loss\*

161. **Introduction** Recoverability of pure economic loss is an issue which stands at the cutting edge of many questions: how far can tort liability expand without imposing excessive burdens upon individual activity (or, as some may wish, to what extent should tort rules be compatible with the market orientation of the legal system)?<sup>574</sup> How should

<sup>568</sup> BGH loc.cit.

<sup>569</sup> ECJ 22nd April 1997, NJW 1997, 1839, 1840.

<sup>570</sup> Palandt-*Heinrichs*, BGB<sup>62</sup>, Introduction to § 249, no. 4, with further references.

<sup>571</sup> NJA 1994 p. 637.

<sup>572</sup> *Axberger*, *Ära och integritet*, JT 1995-95 p. 716 (726 f) as well as *Hellner and Johansson*, *Skadeståndsrätt*<sup>6</sup> (2000) 408 interpret that as partial punitive damages.

<sup>573</sup> UfR 1986 p. 405.

\* Authored by *Mauro Bussani*; sub-edited by *Christian von Bar*. This Chapter is largely based on research conducted over the last six years by *V.V. Palmer* and the author. See *Bussani and Palmer* (eds.), *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003). Information on Swedish law by *Johan Sandstedt*. This part is concerned with tort law alone; pure economic losses are recoverable in all European contract law systems.

<sup>574</sup> *Benson*, ‘The Basis for Excluding Liability for Economic Loss in Tort Law’, in *D.G. Owen*, *The Philosophical Foundations of Tort Law* (1995), pp. 427, 431. The same author, articulating a well known *tòpos* among tort lawyers (see e.g. *Viney*, *Introduction a la responsabilité*, in *Ghestin* (ed.), *Traité de droit civil* (1995), p. 21; *Monateri*, *La responsabilità civile*, in *R. Sacco* (ed.), *Trattato di diritto civile* (1998), p. 8 ff.) writes: “[T]he fact that every individual is

the tort law of the twenty-first century – or the provisions of a projected European code – approach this issue? As a matter of policy, should the recovery of pure economic loss be the domain principally of the law of contract?

**162. No universal definition** There has never been a universally accepted definition of ‘pure economic loss’. Perhaps the simplest reason is that a number of legal systems neither recognize the legal category nor distinguish it as an autonomous form of damage. Nevertheless, where the concept is recognized, as in Germany and Common Law systems, it is apparently associated with a rule of no liability and a definition is likely to be found. However, as it will be made clear by the following pages, the contrasting approaches do not follow the familiar common law/civil law divide, for civil law is itself divided to some extent over this question.

**163. Pure versus consequential economic loss** What the ongoing debate about the notion of ‘pure economic loss’ makes clear is twofold: the negative cast and the patrimonial character of that loss. In countries where the term is well recognized, its meaning is essentially explained in a negative way. It is loss without antecedent harm to plaintiff’s person or property. Here the word ‘pure’ plays a central role, for if there is economic loss that is connected to the slightest damage to person or property of the plaintiff (provided that all other conditions of liability are met) then the latter is called *consequential* economic loss and the whole set of damages may be recovered without question. *Consequential* economic loss is recoverable because it presupposes the existence of physical injuries, whereas pure economic loss strikes the victim’s wallet and nothing else. In Sweden, where the legislator says that only victims of crimes may recover for pure economic loss, the Tort Law Act 1972, § 2, defines the notion exactly in these terms: ‘In the present act, “pure economic loss” (*ren förmögenhetsskada*) means such economic loss as arises without connection to personal injury or property damage to anyone.’<sup>575</sup> A similar definition seems to prevail in England and Germany.<sup>576</sup>

**164. An artificial distinction?** One will discern from these preliminary remarks that the distinction under discussion is highly technical, perhaps even artificial. This impression

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somewhere and is making use of some external objects, with the result that he or his property is put into relation with them and is subject to being affected by conduct that affects them, is an inevitable incident of being active in the world ... as beings who exist in space and time and who are inescapably active and purposive, persons are necessarily and always connected in manifold ways with other things which they can affect and which in turn can affect them as part of a causal sequence.” *Benson*, *Excluding Liability*, at p. 443 (emphasis and footnotes omitted).

<sup>575</sup> *van Gerven/Lever/Larouche* (eds.), *Tort Law: Scope of Protection* (1998), p. 44.

<sup>576</sup> See Lord Denning’s statement that ‘it is better to disallow economic loss altogether at any rate when it stands alone, independent of any physical damage’. *Spartan Steel & Alloys Ltd v Martin & Co. Ltd* [1973] Q.B. 27. Regarding *Reimer Vermögensschaden*, *van Gerven et al.*, *Tort Law* (1998) at p. 43, speak of a ‘worsening of one’s overall economic position (loss of profit, diminution in the value of property, etc.) that is not directly consequential upon injury to the person or damage to a particular piece of property’.

is based upon two technical features of the exclusionary rule. The first feature is that 'consequential' economic loss only describes a relationship of cause and effect within the same patrimony (plaintiff's). All relation of cause and effect running between patrimonies is technically excluded. Put another way, when pecuniary loss is described as 'pure' (rather than 'consequential') it is apparent that each patrimony is viewed as an interruption of causation. For example, an injury to B (say, the breadwinner of the family) may have an immediate and foreseeable economic consequence upon A (his dependent child). Yet this causal impact is disregarded by the way in which our subject is defined. The child's loss of support will not be called 'consequential' economic loss, though clearly it did arise as a 'consequence' of physical injury to a parent. It is apparent, then, that those legal systems which employ these labels conceive of economic loss as an isolated phenomenon, as if plaintiff's patrimony were a separate world, cut off from all others. It is also apparent that this logic defies economic and social reality. In the real world, 'a practically unlimited range of interests are intertwined in an almost unlimited variety of ways'.<sup>577</sup> The affairs of economic actors are highly interdependent, connected to one another by a web of rights and duties that bind together contractual, proprietary and any other sort of legal interests. In these circumstances it is reasonably foreseeable that damage to any one interest may affect other interests. Indeed, it has been rightly said that 'no reverberation from the initial damage, so long as it arises through this interdependence of interests, can intelligibly be distinguished as extraordinary or unforeseeable'.<sup>578</sup> Yet the inevitable effect (of what we might call the exclusionary rule's 'atomistic' approach to causation) is that the scope of 'consequential' loss is artificially narrow, and accordingly the incidence of 'pure' economic loss is greatly multiplied. A second technical aspect is that, although all countries following the exclusionary rule may be in 'acoustical' agreement on the proposition that 'consequential loss' is recoverable, they actually do not agree in concrete instances how it will be applied. Since consequential loss is a causal construct influenced (in its ultimate results) by policy considerations, it is unsurprising to find divergent interpretation at national level. Some national courts have developed rules that require a more stringent connection between antecedent physical loss and the economic harm which results from it. Under such rules the court may conclude that plaintiff's loss was 'pure' (hence unrecoverable) because there was insufficient relation to prior physical harm sustained by the plaintiff. Yet judges in other systems, employing less exigent notions, may deem the same loss 'consequential' and thereby permit its recovery.<sup>579</sup>

**165. Actor's state of mind: intention versus negligence** The exclusionary rule is associated with economic loss caused by negligent behaviour, not intentional wrongdoing. European systems do not begin to diverge until the question becomes one of liability for negligence. Here is a kind of rubicon which some fear to cross and others blithely dismiss. However, all systems agree that intentionally inflicted pure economic loss is recoverable in circumstances where the conduct in question is regarded as culpable, immoral or contrary to public policy. The significance of this point is of more practical importance

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<sup>577</sup> Benson, 'Excluding Liability for Economic Loss', at p. 431.

<sup>578</sup> Ibid.

<sup>579</sup> von Bar, *The Common European Law of Torts*, vol. II (2000), pp. 30-5, 487-9.

than it may appear at first sight. Its range of application may be somewhat greater than the narrow, infrequent form of liability which the words 'intentionally inflicted' harm suggests. In some systems a broad, flexible meaning is given to the 'intention' element.<sup>580</sup> Furthermore, though harder to prove than negligence, the incidence of financial fraud is not a rare occurrence. A consistent rule across Europe is therefore an important protection. Secondly, we think it is interesting to observe from the comparative point of view that the shift to higher degrees of culpability tends to broaden the scope of recovery in all systems.

**166. Ricochet loss** We venture to set forth four categories that seem to be functionally and relationally distinct. The first of these four categories is ricochet loss. 'Ricochet loss' classically arises when physical damage is done to the property or person of one party, and that loss in turn causes the impairment of a plaintiff's right. A direct victim sustains physical damage of some kind, while the plaintiff is a secondary victim who incurs only economic harm (Example: A has a contract to tow B's ship. C's negligent act of sinking the ship makes it impossible for A to perform his contract and thus deprives him of expected profits. A's financial loss is the ricochet effect of C's negligence toward B. The loss is purely economic, since no property interest of A's has been impaired.)<sup>581</sup> A ricochet loss can also arise from the impairment of an employment contract. For example, B is a key employee in A's business or sporting team. C's negligent driving leads to B's death or incapacity, thus causing A's team or business to lose profits and revenues. Here B's injury is physical, but A's loss is purely financial. The Italian *Meroni Case*<sup>582</sup> and some of the so called 'Cable Cases'<sup>583</sup> are also variations of ricochet harm.

**167. Transferred loss** Here, C causes physical damage to B's property or person, but a contract between A and B (or the law itself) transfers a loss that would ordinarily be B's onto A. Thus a loss ordinarily falling on the primary victim is passed on to a secondary victim. The transfer of the loss from its 'natural' to an 'accidental' bearer differentiates this from a case of ricochet loss, where the damage in question is not transferred but is a distinct damage to the interests of the secondary victim. These transfers frequently result from leases, sales, insurance agreements and other contracts that separate property rights from rights of use or specifically reallocate risk bearing. (Example: A is time charterer of a ship owned by B. The day before the time charter is going to effect and while the ship is in B's possession, C negligently damages the ship's propeller, thus necessitating repairs and a two-week delay, which causes A to lose all use of the ship. Here B suffers property damage, and ordinarily B as owner would recover for the consequential loss of the ship's use, but the right of use had been transferred to A by the boat charter. So A's loss is

<sup>580</sup> See e. g. *von Bar*, 'Liability for Information and Opinions Causing Pure Economic Loss to Third Parties: A Comparison of English and German Case Law', in B. Markesinis (ed.) *The Gradual Convergence* (1994), p. 99 ff., at 104.

<sup>581</sup> The example closely follows *La Société Anonyme de Remorquage à Helice v. Bennets* [1911] 1 KB 243.

<sup>582</sup> *Torino Calcio SpA v. Romero*, Cass. Civ., SU 26 January 1971, no. 174, *Giur.it.*, 1971, I, 1, 681.

<sup>583</sup> See e. g. *Spartan Steel & Alloys v. Martin & Co.* [1973] Q.B. 27.

purely pecuniary because he has no antecedent property loss).<sup>584</sup> A similar effect can result under a sales contract which reserves title in B (seller) while the goods are in shipment, but places the risk of loss in transit upon the buyer A. If the goods (still technically owned by B) are damaged in transit by the carrier's negligence, then a loss normally incurred by the owner has been transferred to A. A's loss is purely financial since he has no property interest in the goods.<sup>585</sup> A similar result is reached when the transfer occurs by operation of law. For example B, A's employee, may be injured by the negligent driving of C and thus find himself unable to work for three months. Nevertheless, a statute requires A to continue to pay B's salary, even though no work is received in return. Thus what ordinarily would have been B's loss is statutorily transferred to A as a combined result of C's negligence and the effects of the pay continuation statute. Transferred loss cases are liability neutral from the perspective of the tortfeasor and should avoid fears of indeterminate liability. An additional argument in favour of an award of compensation is that the tortfeasor who is clearly liable to the primary victim should not benefit from the accidental operation of rules which by pure chance exclude him from liability. According to *von Bar*, the concept of transferred loss is intended 'to prevent someone appealing to rules whose purpose is not to protect that person, but to protect others'.<sup>586</sup>

**168. Closure of public markets, transportation corridors and public infrastructures** Here, economic loss arises without a previous injury to anyone's property or person. There may be physical damage, but it is to 'unowned resources' that lie in the public domain.<sup>587</sup> A single negligent act may necessitate the closure of markets, highways and shipping lanes which no person directly owns, yet the closure inflicts economic loss on individuals whose livelihoods closely depend upon the use of these facilities. This category raises the greatest concern about liability to an indeterminate class in an indeterminate amount. A financial ripple effect is then at its height. (Example: C negligently spills chemicals into a river, and all traffic on the waterway is suspended for two weeks during a clean-up effort. As a result, shippers must take more expensive overland routes, and marinas, boat suppliers, hotel operators and commercial fishermen in the area suffer severe economic loss).<sup>588</sup> A similar chain of loss may arise when C negligently allows infected cattle to escape from his premises, and the government must order all cattle and meat markets to close. As a result, broad classes of plaintiffs will suffer pure economic loss, including cattle breeders who are unable to sell their stock and butchers who are unable to obtain supplies.<sup>589</sup>

<sup>584</sup> The illustration is based upon *Robins Dry Dock v Flint*, 13 F 2d 3 (2nd Cir. 1926), 275 US 303 (1927).

<sup>585</sup> This illustration is based upon *The Aliakmon* [1985] 2 All ER 44.

<sup>586</sup> *von Bar*, Common European Law of Torts, I, p. 510.

<sup>587</sup> *Goldberg*, 'Recovery For Economic Loss Following the Exxon Valdez Oil Spill', (1994) 23 *Journal of Legal Studies* 1, 37.

<sup>588</sup> Cf. *Louisiana ex rel. Guste, v. M/V Testbank (The Testbank)*, 752 F 2d 1019 (1985).

<sup>589</sup> *Weller v. Foot and Mouth Disease Research Inst.* [1966] 1 Q.B. 569.

**169. Reliance upon flawed data, advice or professional services** Those who furnish advice, prepare data or render services concerning financial matters often understand that the information will be furnished to a client and then relied upon by third persons with whom they have no contractual relation. If the advice, data or services are carelessly compiled or executed, this may not necessarily breach the provider's contract with their client but the relying third party will sustain pure pecuniary loss. (Example: C, an accountant, carelessly conducts an audit of B, a publicly-traded company, and vastly overstates the company's net financial worth. Relying upon the accuracy of the audit, investor A buys shares in B at twice their actual value. Here, A's loss arises not in consequence of physical damage to B, but on the basis of misplaced reliance.) Similarly, erroneous information about a client's solvency may lead to financial losses. Thus A, before extending credit to B, takes the precaution of asking C (the merchant bank where B kept its account) for an assessment of B's creditworthiness. C carelessly replies that B is 'good for its ordinary engagements' (when in fact B would soon go into liquidation), and thereby influences A to advance credit and to lose a large sum.<sup>590</sup> Here, A's loss is purely financial, not because it ricochets off or is transferred from someone else's physical damage, but because it arises directly from A's reliance. Professional services for a client may cause pecuniary loss to a non-client. B, an elderly man, asks C, his lawyer, to prepare a will in which he will leave € 100,000 to A. C takes no action for six months, as a result of which B dies intestate and A receives nothing.<sup>591</sup> A's loss is purely economic.

**170. Present versus future loss** It is the loss of expected wealth – unrealised profits, cancelled legacies – that present the sharpest question for tort law. The difficulty is not simply that the demand for proof is more exigent – by definition, expectancies explore a future that only might have occurred – but also the appropriateness of affording protection in tort. For when an economic expectation receives legal protection in tort, as in principle it does under French law, the plaintiff can be compensated to the same extent *as if* he or she were protected by a contract with the tortfeasor.<sup>592</sup> In countries where an exclusionary rule of tort law exists, we may find a tendency to say that wealth expectancies should be protected in contract.<sup>593</sup> For example, German courts are generally unable to approach the question through tort, but at the same time they willingly stretch contractual concepts that make the defendant liable to the plaintiff, although there is no actual contract between the parties.

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<sup>590</sup> *Hedley Byrne & Co. v Heller & Partners Ltd* [1964] A.C. 465 (HL).

<sup>591</sup> See *White v Jones* [1995] 2 A.C. 207 (HL) and *Ross v Caunters* [1980] Ch. 297.

<sup>592</sup> See *Viney and Jourdain*, *Conditions de la responsabilité*, 71 ff., 195 ff.; *Viney*, *Introduction à la responsabilité*, 360 ff.

<sup>593</sup> Note, for example, the tense unease in the following statement from a British judge: 'I do not consider that damages for loss of an expectation are excluded in cases of negligence arising under the principle in *Hedley Byrne*, simply because the cause of action is classified as tortious. Such damages may in principle be recoverable in cases of contractual negligence; and I cannot see that, for present purposes, any relevant distinction can be drawn between the two forms of action.' *per* Lord Goff of Chieveley in *White v Jones* [1995] A.C. 207.

**171. A challenge to traditional views** In these circumstances it becomes difficult to tell where tort ends and contract begins. We seem to be at the frontier where functions meet and merge, for although it has been theorized that contract creates wealth whereas tort only protects that which we already have,<sup>594</sup> the notion of pure economic loss presents, at a European level, a challenge to traditional views about the relationship between contract and tort law.

**172. Basic arguments for the exclusionary rule** Although their rational basis is open to discussion, it will be useful to set out the fundamental arguments which are usually presented in support of an exclusionary rule. These are (i) the floodgates-argument, (ii) the scale of human values-argument, and (iii) the historic argument. However, the validity of these arguments can not be discussed here.

**173. The 'floodgates' argument** This is the most important of the three arguments. Its first strand is the belief that to permit recovery of pure economic loss in some cases would unleash an infinity of actions that would burden, if not overwhelm, the courts. If defendant's negligence necessitates the closure of trading markets or shuts down all commerce travelling on a busy motorway, there may be hundreds, perhaps thousands of people who would be financially damaged. Assuming a large number of these cases were to reach the courts, there would be administrative chaos. The court system could not cope with the sheer numbers of claims. The second strand is the fear that widespread liability would place an excessive burden upon the defendant. The potentially staggering liability would here be out of all proportion to the degree to which the defendant was negligent. It is also said that it is manifestly impossible for a defendant to predict in advance how many relational economic loss claims he might face when, for example, he injures the property of a primary victim. Whether there is a small or large class of secondary loss sufferers depends, fortuitously, upon the number of parties with economic interests linked to the exploitation of the property. The third strand of the argument maintains that pure economic loss is simply part of a broad modern trend towards increasing tort liability, a trend that must be kept under control.<sup>595</sup>

**174. Scale of human values** A second argument is cast in terms of philosophical values. It maintains that intangible wealth is not, and should not, be treated on the same level as protecting bodily integrity or even physical property. People are more important than things, and things are more important than money.<sup>596</sup> The law protects interests accord-

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<sup>594</sup> Weir, 'Complex Liabilities', no. 6, *International Encyclopedia of Comparative Law*, XI (1976) 5: 'Contract is productive, tort law protective'.

<sup>595</sup> Spier (ed), *The Limits of Liability: Keeping the Floodgates Shut* (1996) and also Spier (ed), *The Limits of Expanding Liability: Eight Fundamental Cases in a Comparative Perspective* (1998).

<sup>596</sup> The argument has been made in England that 'The philosophy of the market place presumes that it is lawful to gain profit by causing others economic loss ... Certainly there seems to have developed an understanding that economic loss at the hands of others is something we have to accept without legal redress, unless caused by some specifically outlawed conduct such as fraud or duress' *The Aliakmon* [1985] 2 All ER 44, at p. 73, *per* Lord Goff.

ing to their rank. And so “a legal system which is concerned with human values (and the law is supposed to reflect the proper values of society) would be right to give greater protection to tangible property than to intangible wealth”.<sup>597</sup>

**175. Historical perspective** Some scholars assert that pure economic loss has traditionally been left unprotected by the law. *Kötz* deduces a teleological point in the evolution of tort law: the primary *purpose* of the law in England and Germany, he maintains, has ‘always been’ to provide protection against personal injuries and harm to physical property. Pure economic loss seems to have been left out of historical development, at least in those two countries.<sup>598</sup> *Feldthusen* argues that the rules of tort based on foreseeability were developed for physical damage and are not workable outside of the context for which they were developed. The straightforward application of the foreseeability test to claims of pure financial loss would lead to ruinous levels of liability.<sup>599</sup>

**176. Liberal regimes** The aforementioned arguments against recoverability of pure economic losses are, however, far from being accepted everywhere, in particular not in what we will call the “liberal regimes” of Belgium, France, Greece, Italy and Spain. A leading characteristic of a liberal regime is the presence of a unitary general clause in the codified law which does not, *a priori*, screen out pure economic loss. Lacking a *numerus clausus* of protected interests imposed by the legislator, these regimes have no in-principle objection to allowing compensation for stand-alone economic harm. The unlawfulness of causing such a loss is not an antecedent abstract question but only an outcome dependent upon whether the normal elements of fault liability are satisfied. These systems are not simply liberal in appearance and approach but in their results as well. A second characteristic is that liberal regimes reach solutions to questions of purely pecuniary loss almost exclusively on the basis of extra-contractual liability and not by crossing over to contract principles. The liberal regimes deal with pure economic loss autonomously in tort, unlike many “conservative” regimes where recourse to contractual and statutory solutions is a standard means of tempering the rigidity of the law of tort. A final characteristic of these regimes, but one that is difficult to discern and substantiate, is the possible use of surreptitious techniques to keep this liability issue under control. To the extent that judges in liberal regimes have any policy restraining recovery for pure economic loss, as some observers suspect they do,<sup>600</sup> they do not admit or deal with it openly. It would of course be possible to carry out such a policy covertly through subtle manipulation of the ordinary requirements of the general clause (particularly the causation requirement) but judicial tendencies of this kind would be unavowed, uncertain and

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<sup>597</sup> *Weir*, *A Casebook on Tort* (9th edn, 2000) 6.

<sup>598</sup> *Kötz*, ‘Economic Loss in Tort and Contract’ *RabelsZ* 58 (1994), 428.

<sup>599</sup> *Feldthusen*, *Economic Negligence*, 10-11.

<sup>600</sup> See, e.g. *Khoury*, ‘The Liability of Auditors Beyond Their Clients: A Comparative Study’, (2001). 46 *McGill Law Journal* 413; *Markesinis*, ‘La politique jurisprudentielle et la réparation du préjudice économique en Angleterre: Une approche comparative’, (1983) *Revue Internationale de Droit Comparé* 31, 44.

difficult to detect. The term pure economic loss and the debatable issues surrounding it therefore would remain generally unrecognized in the literature and jurisprudence of these countries.

**177. Pragmatic regimes** The pragmatic regimes embrace England, Scotland and the Netherlands. These systems are characterized by a cautious case-by-case approach which carefully studies the concrete socio-economic implications of granting recovery for pure economic loss. Results are not driven by the dictates of wide tort principle, nor by a checklist of absolute rights. The principal method of screening recoveries is through the 'duty of care' concept. The duty of care question is a matter of judicial policymaking that is overtly carried out by the judges. Each new situation requires an ad hoc determination that a 'duty' to guard against this harm should exist at all. The judges themselves are expected to make a policy choice, and they exercise this function openly and discursively. Tort law, not contract dominates the field.

**178. Conservative regimes** Among the conservative regimes we have placed Austria, Finland, Germany, Portugal and Sweden. A general characteristic of this regime is that pure economic loss does not figure among the so-called 'absolute rights' which receive protection under their tort law. Its exclusion from the enumeration in BGB § 823 (1) is well known and clear, but even in conservative systems where no enacted list is to be found, the same result has been achieved by other means. As developments in Austria and Portugal show, the judiciary's and/or the doctrine's readiness to import German doctrinal influence may result in a philosophy of absolute rights that is superimposed upon the general clause. The second characteristic is that the recoverability of pure economic loss is an exception and any remedy must be found elsewhere in the system, either on the basis of more specific tort provisions or by an expansive application of contract principles. However, if we focus upon recoveries permitted by the tort law system and make that the point of comparison, the system is quite restrictive in its results. This gives rise to a third characteristic: the recovery of pure economic loss in these systems often receives extensive lateral support from the law of contracts and/or certain statutory mechanisms, and when that lateral contribution is added to the overall picture, results in these systems are considerably liberalized.

**179. France** The general formula *neminem laedere*, 'injure no one', is the basis of articles 1382 and 1383 of the *Code Napoléon*. Because of its encompassing reach as well as its indeterminate potential, this unitary principle does not screen out recovery for pure economic loss. It does not set forth a *numerus clausus* of protected interests; the legislator imposes no *a priori* check upon the judge's free sense of what constitutes recoverable harm. Therefore the question of whether causing pure economic loss is a source of tortious liability becomes a matter of jurisprudence and the advice of doctrine emerged. Under the prevailing view, the prohibition on causing harm is the general rule, and the instances in which one is at liberty to cause harm are exceptions. Articles 1382 and 1383 have consistently been found not to contain any *a priori* limitations on the scope or nature of protected rights and interests, nor to contain an *a priori* class of protected persons. Thus, there has been no difficulty in admitting the economic loss of victims by ricochet, whether it be the expenses of a father forced to make repeated voyages to the

bedside of his son who was injured in Greece through defendant's negligence,<sup>601</sup> or the expenses of an unmarried cohabiting partner of the injured victim.<sup>602</sup> The French general clause is considered hostile to the doctrine which stresses the 'purpose' of legal rules to find the ambit of a defendant's liability. But in French law there is no relational 'duty' requirement as in English and Scots law, and the role of causation is not de-emphasized.<sup>603</sup> In this light, the concept of unlawfulness nearly becomes invisible: one could say it has been globally reassigned to the subsidiary determinations of fault, causation and damage. Unlawfulness is not a severable hurdle but simply the result of applying subsidiary elements of act, fault, causation and damage. Judgments denying relief at that level are not unknown in the jurisprudence. For example, a partnership could not recover for deals that failed to be concluded when the company president who was negotiating them was negligently injured.<sup>604</sup> A creditor whose borrower was negligently killed could not recover from the tortfeasor the sums which the decedent could not repay.<sup>605</sup> The harm was not considered a 'certain' or 'direct' consequence of the negligent act. To those who argue that the floodgates of liability must be firmly closed, the French experience must seem counter-intuitive, an empirical enigma awaiting an answer.

**180. Belgium** Belgium possesses the same unitary principle found in France and has taken essentially a liberal position on reparation for pure economic loss. Belgian jurists approach questions of tort liability by verifying the existence of the 'usual elements' of fault, causation and damage, rather than by preliminary reference to a *numerus clausus* of protected rights or interests. There is in consequence no material means by which recovery of this kind of loss can be peremptorily blocked before the tripartite elements are examined. In Belgium, as in France, articles 1382-1383 of the Civil Code have been consistently regarded as not containing any *a priori* limitations on the scope of protected interests, or on the classes of protected persons.<sup>606</sup> Since there is no limitation on the class of protected persons, there is no need to prove that a duty of care was owed to the plaintiff. The broad contractual principle, '*réparation intégrale du dommage*' (drawn from art. 1149 CC), has been extended to the law of tort by way of interpretation.<sup>607</sup> The principle of 'full' reparation strongly suggests that there should be no reason to exclude from the field of tort a form of damage so commonly recoverable in contract. The

<sup>601</sup> Cass.civ. 20th December 1960, D. 1961.141, note *Esmein*.

<sup>602</sup> *van Gerven et al.*, Tort Law – Scope of Protection (1998) at pp. 144-46; *Chartier*, La Réparation du Préjudice (1983), nos. 184-98.

<sup>603</sup> *Viney*, Introduction à la responsabilité, 566; *Viney*, 'Pour ou contre un principe général de responsabilité pour faute?', (2002) 49 *Osaka University Law Review* 31, 44. *van Gerven*, Tort Law (1998) 32.

<sup>604</sup> Cass.civ. 12th June 1987, JCP 1987.IV.286.

<sup>605</sup> Cass. Civ. 21st February 1979, JCP 1979.IV.145. On similar facts, see Cass.civ. 25th June 1975, Bull. civ., II, no. 195. But see also, from the opposite perspective, Cass.civ. 13th February 2001, JCP 2002.II.10099, note *Lisanti-Kalczynsky*.

<sup>606</sup> *van Gerven et al.*, Tort Law (1998) 146.

<sup>607</sup> *Dalq*, Traité de la responsabilité civile, vol. II, Le lien de causalité, le dommage et sa réparation (1962), p. 452, no. 3416; Cass. 13th April 1995, JT, 1995, p. 649; Cass. 23rd December 1992, Pas., 1992, I, 1406.

principle argues that a victim should be fully compensated, irrespective of the kind of loss that he has suffered. Pure economic loss should simply meet the same causal requirements that any other type of damage must satisfy.

181. **Italy** *Rodolfo Sacco* observes that in managing tort law issues, two different logical patterns can be detected.<sup>608</sup> According to the first, which works by subtraction, all injuries give rise to liability unless there is some defence. This is the pattern now established in France. According to the second, which works by addition, only injuries to an absolute right (plus all similar cases) result in liability. This is the pattern of the BGB. Yet in the case of Italy, Professor *Sacco* characterizes the situation as 'hybrid', at least from a textual perspective.<sup>609</sup> The legislator does not expressly require the violation of an absolute right for liability to be imposed, but at the same time the judge is required to find that the injury was 'unjustified' (Art. 2043 CC: *danno ingiusto*). No textual distinction was made between physical damage and pure economic losses. Until recently, the standard doctrine maintained that an injury is unjustified whenever there is an infringement of an absolute right of the victim, particularly the rights to property, liberty, life or reputation. Only in such cases would the tortfeasor be bound to pay damages. However, the list of absolute rights has never been viewed as a limitation in the case of intentional torts, because it has always been recognized that any form of damage proceeding from an intention to harm should be recoverable.<sup>610</sup> From a comparative perspective, the standard doctrine was therefore quite similar to the German doctrine regarding tort liability under BGB §§ 823-826.<sup>611</sup> The turning point came in a Supreme Court (*Corte di Cassazione*) ruling nearly thirty years ago. In *Meroni*,<sup>612</sup> the Court held that a creditor can recover damages for the pecuniary losses he suffered from an injury to his debtor. It was the case of a famous soccer player who was killed in a car accident. The soccer team, Torino Calcio SpA, sued for damages alleging an economic loss. The creditor had only a relative right (a right *in personam*) derived from the contract. Nevertheless, the Supreme Court stated that – in principle – the team could recover damages. Today, the '*Meroni*' doctrine is used whenever a right *in personam* is infringed, to the extent that 'the right to the integrity of one's assets' (*diritto all'integrità del proprio patrimonio*) has been violated.<sup>613</sup> Thus, in spite of the wide and longstanding debate about the meaning of '*danno ingiusto*', current Italian operative rules do not now differ very much from the positions taken in liberal systems such as Spain and France.

182. **Spain** Under art. 1902 of the Spanish Civil Code, victims are allowed to sue for their economic losses even when they arise independently of physical harm.<sup>614</sup> Whether

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<sup>608</sup> *Sacco*, 'Legal Formants' at 366 (Part Two).

<sup>609</sup> *Ibid.* at 366.

<sup>610</sup> For details see *Cendon*, *Il dolo nella responsabilità extracontrattuale* (1976) 21 ff, 250 ff.

<sup>611</sup> *Castronovo*, *La nuova responsabilità civile*<sup>2</sup> (1997) 3 ff.

<sup>612</sup> *Torino Calcio SpA v. Romero*, Cass.sez.un. 26th January 1971, no. 174, *Giur.it.*, 1971, I, 1, 681, note *Visintini*; *Foro it.*, 1971, I, 342 note *Busnelli*. The case is known in Italy not by the name of the parties, but by the name of the famous football player fatally injured in the accident.

<sup>613</sup> Cass. 24th May 1982, n. 2765, in *Foro it.*, 1982, I, 2864.

<sup>614</sup> See, e.g., the Supreme Court decisions of 4 May 1982 delivered by the First Chamber;

pure economic loss is recoverable becomes a question for case law and the opinion of scholars. Under the prevailing view, the principle of *neminem laedere* appears to be the general rule, and the instances in which a person is at liberty to cause harm can be classified – as in the other liberal systems – as exceptions to the general rule. Thus many Spanish jurists approach questions of tort liability by verifying the existence of fault, causation and damage, rather than any preliminary reference to an *a priori* list of protected rights or interests. Case law appears more indulgent than scholars in awarding redress for losses in general and for pure economic loss in particular. Liability is limited by (i) the technical parameters of causation, (ii) policy considerations contained in the principle ‘general risks of life’,<sup>615</sup> and (iii) the judicial prerogative to reduce awards of damages whenever the defendant is liable for ‘ordinary’ negligence.<sup>616</sup>

183. **Greece** In art. 914 Greek CC no attempt has been made to exclude pure economic loss, nor indeed any other type of damage from the purview of the notion ‘prejudice to another’. Apparently the Greek system gives no *a priori* importance to the intrinsic nature of the damage. Thus it appears that whether the plaintiff may receive compensation for pure economic loss, requires an inquiry into the defendant’s violation of specific legal commands (special statutes, related code provisions and so forth), or failing this, it may involve what has been called the issue of ‘broadening the prerequisite of unlawfulness’.<sup>617</sup> According to the prevailing view, such a broadening process occurs principally by tying the standard of ‘good faith’ (arts. 281, 288) to the unlawfulness question: everyone should behave as good faith and business usages require. Greek case law indicates that the breach of any duty of care imposed by good faith is unlawful.<sup>618</sup> Two other features add to Greece’s liberal credentials. First, when a tortfeasor has damaged the property or person of another, the economic losses that ricochet to a secondary victim are recoverable, even though this secondary harm is purely financial. Greek law does not restrict the class of persons who are entitled to claim compensation for damages, though of course it will require proof of causal relation. Here, damage that in other systems meets scrutiny or even exclusion is in principle recoverable. Secondly, liability for pure economic loss has been recognized by incorporating the notion of *culpa in contrahendo* into the Civil Code (arts. 197, 198) – a form of liability which is treated as extra-contractual.<sup>619</sup>

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Pantaléon ‘Comentario al artículo 1902’, in Comentario del Código Civil, vol. II (1991), pp. 1971-2003; Puig Brutau, Fundamentos de derecho civil, vol. II<sup>3</sup>(1983) 183.

<sup>615</sup> See Pantaléon, ‘Comentario al artículo 1902’, in Comentario del Código Civil, II (1991), p. 1985 and ‘Causalidad e imputación objetiva: criterios de imputación’, Centenario del Código Civil, II (1990) 1566-1568; this principle is also supported by De Angel, Tratado de responsabilidad civil<sup>3</sup> (1993) 787 and Lacruz, Elementos de derecho civil, vol. II<sup>3</sup> (1994) 485.

<sup>616</sup> Lacruz loc.cit. 502, Morales and Sancho, Manual práctico de responsabilidad civil (1993) 102, who quote numerous case decisions.

<sup>617</sup> Christodoulou, unpublished paper on file with author.

<sup>618</sup> AP 640/1955 NoB 4, 491; AP 250/1956 NoB 4, 840; AP 510/1959 NoB 8, 251; AP 343/1968 NoB 16, 943; AP 854/1974 NoB 23, 479; AP 81/1991 NoB 40, 715; EfAth 7453/1988 EllDik 31, 848.

<sup>619</sup> AP 969/1977 NoB 26, 895; AP 1505/1988 NoB 38, 62; EfAth 4913/1991 EllDik 33, 881; Georgiades, General Principles of Civil Law<sup>2</sup> (1996) 378-379.

184. **England and Wales** English law knows a series of intentional economic torts, notably actions for deceit, interference with trade, inducing breach of contract, passing off, misfeasance in public office, intimidation and conspiracy, and if the defendant has intentionally caused such loss, the claim for pure economic loss may fit into one of these pigeonholes. If the loss was occasioned by negligence, however, these actions are unavailable. The plaintiff's chief recourse must therefore be to the tort of negligence. The generic tort of negligence has been compared to a general clause covering all forms of negligent behaviour. This is generally true within the realm of protection from physical harm (bodily injury or damage to property). However, according to a leading authority, *Murphy v. Brentwood DC*,<sup>620</sup> negligence is not primarily applicable to the compensation of pure economic loss. This means that the nature of the plaintiff's damage controls the existence of a duty to avoid causing it. Indeed, the common law starts from the proposition that there is, as a rule, no duty of care to avoid causing pure economic loss. The occasions upon which such a duty is recognized are exceptional and must be kept so. These exceptional occasions cover narrow fact situations. The exceptions began with *Hedley Byrne & Co. Ltd v. Heller & Partners*.<sup>621</sup> They remained limited to negligent misstatements made and relied upon (in a context of 'virtual' contract), negligent interference with the performance of a contract,<sup>622</sup> negligent defamation in the writing of a reference for a former employee,<sup>623</sup> professional negligence in the drawing up of a will,<sup>624</sup> and breach of statutory duty.<sup>625</sup> The danger of unbounded financial repercussion is thus avoided. The presence of other factors which demonstrate a closer degree of proximity between the parties than mere foreseeability of economic harm may be insisted upon, such as defendant's 'assumption of responsibility' for the plaintiff's economic well-being coupled with the plaintiff's reliance upon it.<sup>626</sup> The class of claimants is thereby limited, as if an invisible privity paradigm structured the resulting bond in tort. It may be noted that although actions may be brought concurrently, a contract action can not be used in these circumstances for there is no 'consideration' and therefore no contract between the plaintiff and the defendant. The use of legal policy, especially in tort cases involving patrimonial injury, is a distinct feature of internal common law culture.<sup>627</sup>

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<sup>620</sup> [1991] A.C. 398.

<sup>621</sup> [1964] A.C. 465.

<sup>622</sup> *Junior Books v Veitchi* [1983] 1 A.C. 520.

<sup>623</sup> *Spring v Guardian Assurance PLC* [1993] 3 All ER 273 (CA).

<sup>624</sup> *White v Jones* [1993] 3 All ER 481 (CA), [1995] 2 W.L.R. 187 (HL).

<sup>625</sup> For relevant references, see *von Bar*, Law of Torts I, 328 ff.

<sup>626</sup> The phrase 'assumption of responsibility' originates in *Hedley Byrne*, [1964] A.C. 465, at 528 (Lord Devlin) It seems to make recourse to an underlying contract model to earmark occasions when it is appropriate to impose a duty of care: the assumption of responsibility and reliance upon it must be voluntary. See Lord Goff's speech in *Henderson v Merrett Syndicate Ltd*. [1995] 2 A.C. 145 discussing the role played by voluntariness.

<sup>627</sup> Note, however, that an attempt was made in *Henderson v Merrett Syndicate Ltd* [1995] 2 A.C. 145 to lay down general criteria for the existence of a duty of care to protect pure economic loss without resort to a policy argument.

**185. The Netherlands** Under art. 6:162 of the Dutch CC recovery of pure economic loss seems to be partially but not entirely precluded. Recovery would seem foreclosed under para. (1) (infringement of subjective right), but if the defendant's actions violated a statute<sup>628</sup> or were deemed socially unacceptable behaviour, the economic loss may be considered unlawful. Another provision gives further evidence of the middle path taken by the Dutch legislator. Art. 6:109(1)<sup>629</sup> permits the judge to reduce damage awards that he considers excessive, and this feature may alleviate in part one of the principal fears associated with the recovery of pure economic loss – the spectre of staggering liability. Moderation and pragmatism characterize the jurisprudence as well. The issue of making the tort liability boundaries socially and technically acceptable appears to be tackled in the Netherlands as follows. A possible ground to deny redress is simply to resort to policy reasons (just as common lawyers usually do). Another tool to restrict recoverability is the reference to statutory limits – for example, the limitation that ricochet damages under Dutch law can be claimed by third parties but only so far as the injured party could have claimed them had he himself suffered these losses.<sup>630</sup> Furthermore, Dutch lawyers make frequent resort to the technical devices upon which tort law has traditionally been built. Along with the duty criterion, causation has most often served as the divide between liability and non-liability in Dutch law.<sup>631</sup> Obviously, causal limits fluctuate not in accordance with different causal rules, but because a hierarchical policy has been superimposed upon the same rule.<sup>632</sup>

**186. Germany** According to § 823 (1) of the BGB, individuals are liable if they wilfully or negligently injure 'the life, body, health, freedom, property or other right' of the victim. Deliberately excluded in this list of so-called 'absolute rights' is any reference to injuries of a purely financial kind. It is therefore undisputed that, as a basic rule, pure economic loss is not recoverable in tort. Compensation may be obtained in tort in some exceptional situations, but the plaintiff must find a cause of action in some provision other than § 823 (1) BGB. On the surface, German tort law rules have changed little since their enactment more than a century ago. The real change has been accomplished through case law. For example, German law requires the violation of a right (an 'absolute'

<sup>628</sup> Recoveries for statutory violations will be analysed in terms of the *Schutznorm* theory (*relativiteitsleer*) to which the Dutch Supreme Court has adhered since 1928. This theory is now expressed in art. 6:163 CC: "No obligation to repair damages arises whenever the violated norm does not purport to protect from damage such as suffered by the injured."

<sup>629</sup> Art. 6:109(1) provides: "The judge may reduce the obligation to repair damage if awarding full reparation would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the legal relationship between the parties, and their respective financial capacities."

<sup>630</sup> *Bouman/Tilanus-van Wassenaer*, *Schadevergoeding: personenschade* [Monografieën Nieuw BW no. B-37], 23 *et seq.*

<sup>631</sup> 'Compensation can only be claimed insofar as the damage is related to the event giving rise to liability in such a fashion that the damage, also taking into account its nature and that of the liability, can be imputed to the debtor as a result of this event.' Art. 6:98.

<sup>632</sup> Cf. e.g. H.R. 2nd February 1973, NJ 1973, no. 315, H.R. 30th June 1989, NJ 1990, no. 652 and on foreseeability in products liability H.R. 25th March 1966, NJ 1966, no. 325.

one) but new rights have been added to the traditional set through interpretation. In this way, German law developed the so-called 'right of the established and ongoing commercial enterprise'. Furthermore, § 826 BGB provides that a person is liable if they intentionally cause harm to another in a manner contrary to public policy. To understand the subjective requirements of this provision, it is not deemed necessary that 'the defendant actually intended to cause harm'; it will be enough 'if he was conscious of the possibility that harm might occur and acquiesced in its doing so'.<sup>633</sup> The role this rule plays with regard to our issue can be appreciated if one looks at the factual situations to which it has mainly been applied. These are, for example, participating as a third person in a breach of contract committed by a contracting party, delaying someone's bankruptcy in order to obtain personal benefit at the expense of other creditors, giving false information or omitting to supply information in circumstances where there is a duty to give it.<sup>634</sup>

**187. Contract and tort** In solving questions of pure economic loss, contract remedies are more widely employed in Germany than in other countries. The reason for the enlarged role of contract is probably twofold: on the one hand, apart from rules permitting the concurrence of tort and contract actions, tort law is considered too weak and narrow to safeguard all financial interests that merit legal protection. On the other hand, contract claims may seem to be the relatively safer path to those who dread unleashing the floodgates of tort, since there is certainly less danger of boundless damages occurring in a breach of contract situation. Courts and scholars certainly expanded the sphere of contractual liability beyond the limits marked by the BGB. The range of contractual duties was stretched to include 'implied' duties of care so that liability might arise, not only from the violation of the parties' express obligations, but also from the breach of an implied duty of care. Likewise, German interpreters extended these duties so that in some cases they precede the conclusion (*culpa in contrahendo*) and in others survive the termination or the performance of the contract (*culpa post pactum perfectum*). The most important innovation, however, was that courts and commentators lowered the privity barrier in contract and applied these duties in favour of those who were not parties to any contract. The principal instrument in this regard is the 'contract with protective effects for third parties' (*Vertrag mit Schutzwirkung für Dritte*), which brings strangers to a contract under its umbrella and permits them to sue a promisor for breach of one of the contract's secondary obligations, notably some breach causing purely financial harm to the plaintiff. The function of the contract with protective effects is arguably tort-like in that the protected third party need not stand in a close personal relationship to the promisor, nor be specifically identified in advance. At the same time, it is operationally free of the 'absolute rights' requirement of German tort law and permits recovery of purely financial harm. All these rules are firmly established today to the extent that most

<sup>633</sup> Zweigert and Kötz, Introduction to Comparative Law, at p. 463; Markesinis, The German Law of Obligations, vol. II, The Law of Torts<sup>3</sup> (1997) 895.

<sup>634</sup> Larenz and Canaris, Lehrbuch des Schuldrechts<sup>13</sup> (1994) 276; von Bar, 'Liability for Information and Opinions Causing Pure Economic Loss to Third Parties: A Comparison of English and German Case Law,' in Markesinis, The Gradual Convergence (1994) 104.

of them have been included in the reform of the law of obligations recently adopted<sup>635</sup> and, as a result, many cases that an English or Italian lawyer would consider solely a matter of tort law are actionable in Germany in contract.

**188. Austria** Art. 1295 of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB) provides: “A person is entitled to demand indemnification for the damage from a person causing an injury by his fault; the damage may have been caused either by the violation of a contractual duty or without regard to a contract”. Yet paradoxically, as far as operative rules and outcomes are concerned, Austrian law follows the intellectual lead of German thought<sup>636</sup> and must be classified among the conservative tort regimes of Europe. Thus, as a general rule, pure economic loss is unrecoverable in tort. There are a few tort provisions which permit compensation but on an exceptional basis. As in Germany, therefore, this has prompted an expansion of contractual actions to redress somewhat the deficit in tort. We will look first at available tort actions and then turn to contract.

**189. Tort law** Austrian courts and scholars have restricted the class of persons entitled to damages: ‘a person’, as mentioned in article 1295 ABGB, is not any person. Likewise ‘a damage’ is not any kind of damage, but is limited to the *direct* infringement of life, body, health and property.<sup>637</sup> In this manner, Austrian judges and scholars crafted an approach to pure economic loss along German lines despite an utterly different legislative starting point. Interestingly, the subject of pure economic loss (*reiner Vermögensschaden*) did not attract much interest in Austria until thirty years ago, when the concept itself was taken from German law together with its policy justifications. Other code provisions are more favourable to the recovery of pure economic loss, but these cover somewhat exceptional situations. One is art. 1295 (2). This provision protects against purely financial damage, but only when the tortfeasor commits a ‘truly grave, abominable wrong’.<sup>638</sup> Another exception relates to the infringement of a statute which is intended for the protection of others. Again, damages for pure economic loss can be obtained, whether the protective statutory rule was broken negligently or intentionally: however, it must be clear that the statute was intended to protect against this type of loss.<sup>639</sup>

**190. Contract law** Having veered widely from the danger of ‘boundless’ claims in tort, Austrian interpreters called upon contractual actions to bring greater balance into the system. In the 1960s, courts and scholars accepted from Germany the notion of

<sup>635</sup> Indeed, the Act on the Modernization of the Law of Obligations 2001 (*Gesetz zur Modernisierung des Schuldrechts*, in BGBl 29 November 2001, I, Nr. 61, p. 3138 ff., which came into force on 1st January 2002) has deeply affected the legal landscape.

<sup>636</sup> For a short and useful historical survey of cultural factors which led Austrian jurists, from the second half of the nineteenth century, to fall back on German legal thought, see *Zweigert and H. Kötz*, *Introduction to Comparative Law*<sup>3</sup> (trans T. Weir) 160 ff.

<sup>637</sup> See *Posch and Schilcher*, ‘Civil Liability for Pure Economic Loss: An Austrian Perspective’, in Banakas, *Civil Liability*, 149.

<sup>638</sup> *Posch and Schilcher*, unpublished paper on file with author.

<sup>639</sup> Another ground for recovery arises for negligent advice or statements given by experts and others with specialized knowledge: arts. 1299, 1300.

contractual liability for the breach of pre-contractual duties (the theory of *culpa in contrahendo*)<sup>640</sup> and they also readily imported the concept of ‘contracts with protective effects’ for third parties.<sup>641</sup> The doctrine of ‘positive violation of contract’ (*positive Vertragsverletzung*) is another import from Germany that permits wider contractual liability. A positive violation is assumed in the case of the breach of an implied duty of care and protection, and such constructive duties may include the duty to respect a contracting party’s financial interests. As a consequence, these contractual actions were expanded well beyond their original limits. Nevertheless, it would appear that the Austrian Supreme Court is somewhat more hesitant than German courts to accept recoverability of pure economic loss whenever a pre-contractual duty or a duty vis à vis a third party who is within the protective effect of a contract is broken.<sup>642</sup>

191. **Portugal** Tort law in Portugal shows a deep influence of German legal thought and its negative approach to the recovery of pure economic loss. Among the provisions devoted by the Civil Code to the *Responsabilidade civil*, the opening section (art. 483 (1)) is not interpreted in Portugal as a French-like general clause. Rather, art. 483 (1) resembles § 823 (1) BGB. Portuguese courts and scholars recognize that in using the word ‘unlawfully’, *Vaz Serra*, the author of the 1966 Code, intended to protect only ‘absolute rights’, unless the damage falls within the scope and aim of a protective statute (in which case pure economic loss is recoverable). Portuguese scholars and judges do not work out the notion of unlawfulness in an open-ended perspective. For example, a plaintiff can recover losses stemming from the infringement of rights to personality or to business reputation, inasmuch as these rights are established by particular provisions of the Civil Code. Or recourse could be made to article 485, which decrees liability when the defendant has ‘assumed’ liability for information negligently given. The attempt to fashion a general clause of civil liability out of article 334 (sanctioning the *abuso do direito* along the lines of § 826 BGB) has so far obtained only little scholarly support;<sup>643</sup> and the scope and nature of *culpa in contrahendo* is still disputed.<sup>644</sup> Infringements of pure economic interests are generally not reparable unless a specific provision addresses the question. This is consonant with the attitude of Portuguese scholars who continually resort to German sources and concepts (including the ‘contract with protective effect of third parties’<sup>645</sup> and the ‘*allgemeines Lebensrisiko*’ argument).

<sup>640</sup> Frotz, ‘Die rechtsdogmatische Einordnung der Haftung für culpa in contrahendo’, in Gedächtnisschrift Gschnitzer (1969); Posch, ‘Austria’, in E.H. Hondius (ed.), *Precontractual Liability, Reports to the XIIIth Congress of Comparative Law* (1991).

<sup>641</sup> Cf. Bydlinski, ‘Vertragliche Sorgfaltspflichten zugunsten Dritter’, JBL 1960, 359.

<sup>642</sup> Koziol, *Österreichisches Haftpflichtrecht II*<sup>2</sup> (1984) 70; OGH SZ 48/102, SZ 49/94, SZ 52/135. Cf. OGH JBl 1992, 118, RdW 1992, 350. See also Ostheim, *Zur Haftung für culpa in contrahendo bei grundloser Ablehnung des Vertragsabschlusses*, JBl 1980, 576.

<sup>643</sup> See especially *Sinde Monteiro*, *Responsabilidade por conselhos, recomendações ou Informações* (1989) 545-82.

<sup>644</sup> See, e.g., *Almeida Costa*, *Responsabilidade Civil pela Ruptura das Negociações Preparatórias de um Contrato* (1994); Lisbon Court of Appeal 18 January 1990, *Colectânea de Jurisprudência*, Tomo I, 144.

<sup>645</sup> *Sinde Monteiro*, ‘Responsabilidade por Informações Face a Terceiros’, *Boletim da Faculdade de*

192. **Sweden** The ability to compensate pure financial losses is naturally not in doubt in Swedish contract law either. The starting point for Swedish tort law is chap. 2 § 2 of the Liability Act, in which the existence of a criminal act is what is important. Due to the fact that the Liability Act is only a framework law, it does not exist as a final regulation. Even with criminal acts it is important that the criminal law should protect from pure economic loss.<sup>646</sup> HD of the 18th December 1989<sup>647</sup> concerned the statutorily defined crime of “false attestation” [*osant intygande*] in accordance with chap. 15 § 11 *brottsbalk*. The court accepted a compensation claim despite literary criticism.<sup>648</sup> The boundaries of the ability to compensate for pure economic loss are not clearly outlined. A particular claim comes into consideration beyond the law, where quasi-contractual situations are involved. It appeared that someone used bogus contracts.<sup>649</sup> Later the liability of an expert or consultant was established with the legitimate trust of the third party.<sup>650</sup> HD of the 25th November 1996<sup>651</sup> concerned the liability of a receiver (B), who negligently exploited the property of a third party (K), which did not belong to the bankrupt’s estate. It appears as if the Supreme Court qualified this case as the causation of pure economic loss, and nonetheless granted the compensation claim.<sup>652</sup> Special rules on the ability to compensate for pure economic loss, moreover, are also found in the Liability Act itself. Chap. 3 § 2 clarifies, that the state and communes are also liable for pure economic loss in the case of negligence. A private employer, on the other hand, is only liable for pure economic loss which is caused by a criminal act of an employee (chap. 3 § 1 Nr. 2 Liability Act). The state and communes are liable in accordance with chap. 3 § 3 Liability Act, possibly also for negligent false advice or information and the pure economic loss resulting from it. Furthermore, a few particular laws are to be referred to. In accordance with chap. 32 § 1 (2) environmental law code [*miljöbalk* (1998:808)] a “not insignificant” pure economic loss is compensatable for, even if it is not caused by a criminal act. In accordance with § 48 personal information law (concerning data protection) [*personuppgiftslag* (1998:204)] damage from the law-breaching passing on of protected personal information can be compensated for. Very similar regulations are found in § 21 credit information law [*Kreditupplysningslag* (1973:1173)] and in § 18 Debt Recovery

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Direito da Universidade de Coimbra, vol. LXXIII (1997), p. 35 f. (also in *Dereito, Revista Juridica da Universidade de Santiago de Compostela*, vol. 7, 1998, n. 1, 203 f.).

<sup>646</sup> *Hellner and Johansson*, *Skadeståndsrätt*<sup>6</sup> (2000) 81 ff; *Kleineman*, *Ren förmögenhetsskada vid brott det ”klara” ansvarsområdet?*, JT 1989-90 p. 650-659.

<sup>647</sup> NJA 1989 p. 796.

<sup>648</sup> *Kleineman* loc.cit.

<sup>649</sup> HD NJA 1980 p. 383.

<sup>650</sup> HD 14th October 1987, NJA 1987 p. 692 (*Kone-Case*). In HD 19th December 2001, NJA 2001 p. 878 this principle of liability for reliance was once again confirmed. In the concrete case it lead to a dismissal of the legal action, though. Compare on this *Kleineman*, *Om den befogade tillitens skadeståndsrättsliga relevans*, JT 2001-02 p. 625-635 (632 f) and *Sandell*, in *Koziol/Steininger* (eds.), *European Tort Law* (2001) 447.

<sup>651</sup> NJA 1996 p. 700.

<sup>652</sup> *Hellner and Johansson* loc.cit. 72; *Kleineman*, *Ren förmögenhetsskada*, 292.

Act [*inkassolag* (1974:182)<sup>653</sup>]. Also after § 33 competition law [*konkurrenslag* (1993:20)], after § 29 marketing law (*marknadsföringslag* [1995:450]), after the law on the protection of industrial secrets [*lag* (1990:409) *om skydd för företagshemligheter*] and after numerous company and employment law measures, the compensation for pure economic loss comes into consideration.

**193. Interim conclusions** The foregoing has been an attempt to set forth a coherent way of describing the various approaches of the legal systems to the issue of pure economic loss. The outcome is that a common theoretical matrix of pure economic loss does not exist in Europe. The ways of approaching the problem are multifarious. We find the issue absorbed within the mainstream of the general clause in the liberal regimes and, in some others, we find it driven by the fear of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.<sup>654</sup> This fear is managed of course through technical devices. These are, basically, the duty of care element in the pragmatic regimes and the unlawfulness requirement in the conservative systems – although some of these conservative regimes seek intense 'lateral' support to the recoverability of pure economic loss through contract law rules. Recoverability of pure economic loss cannot be approached in terms of some distinctive trait or characteristic of the 'legal families' of Western Europe. The question is not a civil law versus common law issue. The approach of the conservative civilian regimes and the Common Law as well contrasts with the liberalism of certain civilian countries such as France and Belgium where the protection of economic loss is widespread and the issue is barely recognized. If any split is to be recognized it would appear, in our view, to lie between those countries which have an overt system of protected interests and those which do not.<sup>655</sup> It is this criterion which seems to underlie differences within the civilian camp and which draws English law conceptually closer to German law. Civil law countries are found amongst the liberal, pragmatic and conservative regimes of Europe, and thus to the extent that Europe is divided, the civil law countries are themselves divided, not *from* the common law, but *along with* the common law.

**194. Absence of methodological common core** Four principal methodologies dominate the European landscape, and although some countries resort to more than one of these methods (thus adding to the complexity), generally each has one characteristic means of dealing with the issue of pure economic loss. Thus the compensation issue may be left to (i) flexible causal determinations (the characteristic method found in the liberal regimes); (ii) preliminary judicial screening using a 'duty of care' analysis (the approach particularly prominent in England and Scotland); (iii) recourse (in Austria and Sweden) to causation techniques aiming to exclude 'third party loss'; and (iv) a scheme of absolute

<sup>653</sup> See on this HD 19th February 1985, NJA 1985 p. 143 and HD 9th October 1990, NJA 1990 p. 585.

<sup>654</sup> *Ultramares Corp'n v. Touche* 255 NY 170 (1931) at p. 179, *per* Cardozo CJ.

<sup>655</sup> See Banakas, 'Liability for Incorrect Financial Information: Theory and Practice in a General Clause System and in a Protected Interests System,' (1999) 7 *European Review of Private Law* 261. See also Lipstein, 'Protected Interests in the Law of Torts', (1962-3) 21 *Cambridge Law Journal* 85.

rights that, by deliberate omission, leaves this interest unprotected (the approach of Austria, Germany and Portugal). The liberal regimes rely upon general clauses and start from an inclusive position, the conservative regimes impose a limited listing of protected interests and start from an exclusionary position. The first group allows recovery in principle, the second denies it on principle. One grants recoveries through tort actions, the other must deny relief in tort if it cannot find an exception, and failing that, it must turn to paracontractual actions such as *culpa in contrahendo* or contracts with protective effects for third parties. Indeed, the resort to contractual actions as a means of overcoming the narrowness of tort protection reveals still another methodological split in Europe: some countries deal with this issue solely in tort while others rely heavily on flexible contractual devices to palliate the sternness of their tort approach. In this same vein we have already seen that formal structures and legal jargon are sometimes façades which hide a deeper reality, and no great reliance should be placed upon them. French and German law may appear to have radically opposed starting points, but in both countries the practice of the courts seems to adopt a more intermediate position.<sup>656</sup>

**195. The time factor** Any general assessment of common tendencies in Europe must take into account the factor of time. In the past 40 years, Italy changed in effect from a system of 'protected interests' to a general clause system. Within that same period England and Scotland admitted as many as five exceptions to the rule of no-recovery. If we take an even longer view we may note that in the twentieth century, France abandoned a more restrictive attitude that had been current throughout the previous century. Austrian history shows a departure from the liberal façade of the ABGB in the second half of the nineteenth century, and since then its legal system has been accepting German doctrinal thought on pure economic loss together with the usual justifications for its control.

**196. The substantive common core** Whether there is a common core of principles governing pure economic loss requires us to weigh in the balance the degree of European agreement on three subjects: (i) consequential economic loss; (ii) intentionally caused-economic loss; and (iii) the selective protection of negligently-caused economic loss.

**197. Consequential loss** We have already highlighted that if economic loss is connected to the slightest damage to person or property of the plaintiff, the whole may be recuperated without question – provided that all the other requirements for the action to be successful are met. This 'parasitic' loss is recoverable because it presupposes the existence of physical harm to the victim, whereas pure economic loss strikes the victim's wallet and nothing else. Consequential loss of this kind is protected in every European system.

**198. Intentional harm** Here is an additional building block to the common core. All systems agree that intentionally-inflicted pure economic loss is recoverable in circumstances where the conduct in question is regarded as culpable, immoral or contrary to public policy. Certainly, in these kinds of cases it may not always be easy for the plaintiff to satisfy the burden of proof (although this may be reduced somewhat by the broad

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<sup>656</sup> Zweigert and Kötz, Introduction to Comparative Law<sup>3</sup> (trans. T. Weir) 628.

meaning given in some systems to the ‘intention’ element), but it is significant from the comparative point of view that the shift to a higher degree of culpability is sufficient reason to impose liability in all systems.

**199. Key areas of negligence-based protection** With regard to liability based upon negligence the following areas seem to be common ground. The first is when the plaintiff’s loss is due to negligently performed professional services. There is widespread agreement that, e. g., a careless notary, a negligent auditor and a negligent credit rating institute will be responsible for the economic losses of some persons (beyond their clients) with whom they had no contractual tie. Although there may be specific requirements that must be met in some systems that others do not clearly impose (for example, the German and English emphasis upon showing the ‘reliance’ of the third party), still it seems fair to say that in many situations (provided indeterminate and excessive liability is excluded) plaintiffs may recover purely financial losses. This seems to reflect the common view that a high standard of professional services can and ought to be maintained. A second agreement exists in the area of compensation for ‘transferred’ economic loss. This agreement undoubtedly arises because jurists in both liberal and conservative countries have recognized that transferred loss is liability-neutral from a tortfeasor perspective, arising difficulties are more of a technical nature than of policy or equity. The third area of substantive agreement involves cases in which the defendant has negligently interfered with the conduct of plaintiff’s business and trade or has carelessly issued an incorrect character reference.

**200. Contract, tort and property law** Throughout this chapter we have seen the conceptual interdependence which exists between underlying contract and property ideas and the law of tort. Suffice it to recall, for example, the problems raised by the notion itself of pure economic loss, the flexible boundaries that comparative analysis enabled us to draw as to the so called ‘consequential’ economic loss, as well as the great reliance upon contract rules to handle the issue in certain regimes. Even more strikingly than in other domains, any attempt at “codification” concerning pure economic loss therefore will be closely dependent on the solutions which the same code intends to offer in the other fields of private law, mainly with regard to contract and property.

## (7.) Employer’s Liability

### (a) Tort law

**201. General** A further area in which significant differences between contract and tort law can exist, is the liability for assistants. Generally it can be said that contractual liability (i) covers a wider circle of people than tortious liability, because the former includes the liability for independent contractors,<sup>657</sup> and (ii) that the contractual

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<sup>657</sup> Non-contractual liability also for independent sub-contractors is only recognized by Dutch law. Art. 6:171 Dutch BW reads: “If a non-servant (*een niet ondergeschikte*) who performs activities in order to carry on the business of another on the latter’s instruction is liable to a

liability for assistants always operates fully independently of fault of the principal, whereas tortious liability on the other hand, is mostly independent of fault, but not always. (This type of liability of a business for damage or injury caused by its assistants must of course be distinguished from the personal liability of employees to third parties. The latter form of liability, which depends on extremely diverse requirements, has not been examined further in this study. We confine ourselves to the observation that legal differences in this field could well have consequences for the free mobility of workers in the European Union.)

The more severe the regime of liability in tort law that a business is subject to for its assistants, and the wider the range of personnel that are comprehended by this liability, the more probable it is that competitive disadvantages will result. The burdens we consider are particularly perceptible in those places where non-contractual liability extends to liability in respect of wrongful acts or omissions on the part of independent contractors, as is the case, for instance, under Dutch law (Art. 6:171 BW). The liability to which a German business is subject to under § 831 BGB or to which a Spanish business is subject to under art. 1903 (4) CC, as is detailed below, is always less extensive. An enterprise which is liable under German or Spanish law, in other words, is concerned with manifestly reduced risks of liability in comparison with a business which is liable under Dutch law. So far as the point was addressed at all, businesses responding to our questionnaires indicated only that the problem necessitates suitable insurance cover. No comments on this specific issue were received from the insurance sector.

**202. France and Belgium** Non-contractual liability for others has its starting point in French tort law in art. 1384 para. 5 CC, which reads as follows: "Masters and employers (are liable), for the damage caused by their servants and employees in the functions for which they have been employed". In French scholarship the term "employer-employee" is interpreted very broadly in the sense of "master-servant".<sup>658</sup> In the view of the *Cour de Cassation* the employer-employee relationship is characterized by the right of the employer to give the employee orders in relation to the carrying out of the employee's work.<sup>659</sup> Leading authors see the essential element in the employer-employee relationship, however, not in the *subordination du préposé*, but rather in the fact that the *préposé* works for payment from the *commettant* and for its profit.<sup>660</sup> Nonetheless the authors point out that the employer-employee relationship in practice is almost always characterized by the existence of a contract for employment.<sup>661</sup> Liability of an employer exists

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third party for a fault committed in the course of those activities, that other person is also liable to the third party."

<sup>658</sup> See only *Flour/Aubert/Savaux*, *Le fait juridique*<sup>9</sup>, No. 203 p. 195.

<sup>659</sup> Cass.civ. 12th January 1977, Bull. Civ. 1977, II, no. 9 p. 8 («L'existence d'un lien de préposition ne suppose pas que le commettant possède les connaissances techniques nécessaires pour pouvoir donner des ordres avec compétence. Il suffit qu'il ait eu la possibilité de donner au préposé des ordres ou les instructions sur la manière de remplir ses fonctions»).

<sup>660</sup> *Viney and Jourdain*, *Les conditions de la responsabilité*<sup>2</sup>, no. 792 p. 866.

<sup>661</sup> *Viney and Jourdain* loc.cit. p. 867.

in accordance with art. 1384 (5) CC as a rule only if the employee, in the functions for which he has been employed, has made a mistake. The extent of this *fait dommageable* of the employee to the functions for which he has been employed, according to the case law, does not have to be particularly narrow, though.<sup>662</sup> With regard to the personal liability of the employee, who has made an error in the functions for which he has been employed, the *Assemblée plénière* of the *Cour de Cassation* recently decided, that the *préposé, qui agit sans excéder les limites de la mission qui lui a été impartie par son commettant*, is not responsible vis-à-vis third parties.<sup>663</sup> Art. 1384 para. 3 of the Belgian CC corresponds word for word with art. 1384 para. 5 of the French CC. In the Belgian legal system the existence of an *employer-employee* relationship is confirmed, if a relationship of subordination exists. Such a relationship normally exists in the form of an employment relationship; it can however depend upon the circumstances. Following art. 1384 (3) CC the liability furthermore requires as a rule, that the employee has made an error or that strict liability is imposed on him. Moreover, the action concerned must have occurred in the course of an activity for which the employee was employed, and at the least have an indirect connection with that activity.<sup>664</sup>

**203. Italy** Art. 2049 of the Italian CC confirms that employers and principals are liable for damage which has been caused by the tort of their employees in the carrying out of the work given to them by the employer. This involves strict liability which is independent of the fault of the employer,<sup>665</sup> which is based on a master-servant relationship (*rappporto di preposizione*).<sup>666</sup> It is mostly required though, that the employee has culpably brought about the *danno ingiusto* caused by him.<sup>667</sup> The employer or principal is also liable for non-economic loss caused by their employee (art. 2059 CC).<sup>668</sup> Employer and employee are liable as joint debtors (art. 2055 CC).<sup>669</sup> Teachers and those who instruct on a trade or craft, are liable for damage caused by a tort of one of their pupils or trainees, if at the time they were under the teacher's or instructor's supervision. Teachers and instructors are only then relieved of liability if they prove that they could not prevent the action (art. 2048 CC).

**204. Greece** The Greek legislature introduced strict liability for employers following the model in French law. It is regulated in art. 922 CC. The grounds for the liability of employers is seen predominantly in the concept that the employer gets the benefit of the work done by the employee; by bringing in employees the employer expands its sphere of business and influence with the consequence of a heightened endangerment of the

<sup>662</sup> *Malaurie and Aynès*, Responsabilité délictuelle<sup>11</sup>, no. 161-164, p. 89-92.

<sup>663</sup> Cass.civ. (Ass. Pl.) 25th February 2000, *Bull. Ass. Pl.* 2000, no. 2 p. 3.

<sup>664</sup> *van Gerven*, *Verbindenissenrecht II*<sup>7</sup>, 320-326.

<sup>665</sup> Cass. 20th June 2001, n. 8381, *Giust. civ. Mass.* 2001, 1223; Cass. 10th May 2000, n. 5957, *Giust. civ. Mass.* 2000, 980; Cass. 29th August 1995, n. 9100, *Giust. civ. Mass.* 1995, 1554.

<sup>666</sup> *Castronovo*, *Problema e sistema nel danno da prodotti* (1979) 166-171.

<sup>667</sup> *De Cupis*, *Il danno, Teoria generale della responsabilità civile*, I (1979) 164.

<sup>668</sup> Cass. 19th February 2002, n. 2380, *Giust. civ. Mass.* 2002, 256; Cass. 1st September 1999, n. 9198, *Giust. civ. Mass.* 1999, 1877.

<sup>669</sup> Cass. pen. 27th April 1992, *Giur. it.* 1993, II, 608.

interests of third parties.<sup>670</sup> Art. 922 CC requires that someone orders someone else to carry out work, and this person in carrying out the work damages a third party in breach of the law. The term “ordering someone to carry out work” is to be understood in a broad sense; under it comes every wilful employment of assistants in the area of work of the employer.<sup>671</sup> It is further necessary that the person carrying out the work has a certain dependence on the employer. In this respect a number of problems with details are unsolved, however.<sup>672</sup> Case law has fostered the existence of a dependent relationship eg. the existence of an employment contract, to be enough, if the person ordering lays claim to a general management and supervision right with regards to the employer.<sup>673</sup> For the founding of the liability of an employer, according to the wording of art. 922 CC, an action in breach of the law by the employee is sufficient. In the leading view, fault on the part of the employee is as a rule required, because art. 922 did not intend the alteration of the requirements of tortious liability, but merely the introduction of liability for someone else’s fault. Fault on the part of the employee is therefore only not required if the norm establishing liability itself does not demand fault (as for example art. 924 CC).<sup>674</sup>

**205. Portugal** The Portuguese CC regulates the so-called “*responsabilidade do comitente*” within the measures on risk liability. Art. 500 (1) CC reads: “He who commissions another person with the task of carrying something out (*comissão*), is liable independent of fault for damage which the employee (*comissário*) has caused, in as far as there is an obligation to compensate for it.”<sup>675</sup> After art. 500 (2) CC “the principal is only liable if the damaging conduct of the employee, whether or not intentional or contrary to the instructions of the said principal, took place during the carrying out of tasks entrusted to him.” The liability of employers is therefore objective. It requires (i) a dependent relationship between employer and “employee”, (ii) the committing of a tort on the part of the latter in the performing of his function, and (iii) the personal liability of the employee.<sup>676</sup>

**206. Germany** In German law the liability of an employer for vicarious agents is regulated in § 831 BGB. It concerns a measure which in today’s almost unanimous view must be seen to a large extent as being unsuccessful.<sup>677</sup> Following § 831 (1) sentence 1 BGB a person who orders another person to carry out work is “obliged to compensate for damage which the other has unlawfully caused to a third party in carrying out the task.”

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<sup>670</sup> Georgiades/Stathopoulos (-Stathopoulos), Art. 922, no. 1.

<sup>671</sup> Stathopoulos, loc.cit. no. 14.

<sup>672</sup> Stathopoulos, loc.cit. no. 27.

<sup>673</sup> A.P. 942/1976 NoB 25/1977, 359; A.P. 300/1980 NoB 28/1980, 1723. Compare also A.P. 1270/1989 EllDik 32/1991, 765 (liability of a clinic for defective treatment by its doctors).

<sup>674</sup> Stathopoulos, loc.cit. no. 24.

<sup>675</sup> The terms “*comissão*”, “*comitente*” and “*comissário*” in art. 500 CC are to be interpreted widely. They concern duties or activities performed for another and under the direction of another: STJ 8th May 1996 CJ(ST) IV (1996-2) 253.

<sup>676</sup> STJ 28th April 1999 CJ(ST) IX (1999-2) 185, 190.

<sup>677</sup> On this and the following in-depth and with numerous demonstrations *von Bar*, The Common European Law of Torts I, paras. 185-190.

Sentence 2 then adds: “The duty to compensate does not arise if the principal observes the conventionally required care in the selection of the person appointed and, so far as he has to procure devices or equipment or manage the carrying out of the task, in procurement or management, or if the damage would have occurred even if that care was taken.” The basic concept is therefore that of liability of the principal for the unlawful (but not necessarily culpable) conduct of his assistant on the basis of the employer’s rebuttably presumed fault. The antiquated wording of the legislation which opens up a possibility to the employer to present exculpatory evidence, does not correspond, however, to the current legal position. The case law since the coming into force of the BGB has undertaken all conceivable efforts, in order to transform employer’s liability in reality into strict liability. Many different techniques have been used, of which the only to be referred to here are (i) the continuous intensification of supervision liability, (ii) the development of a concept of organization duties, (iii) the softening of contractual supporting concepts (for instance *culpa in contrahendo* or a contract with protective effects in favour of a third party) and the development of a so-called employment law exemption claim. The employee is entitled in particular circumstances to make a claim against the employer which protects the employee from personal demands by the injured third party, this contractual exemption claim naturally operates independently from the fault of the employer. § 831 (1) sentence 2 BGB has in this way almost completely lost its practical significance. The provision is, however, co-responsible for the fact that German law searches for more solutions in contractual liability than almost all other European legal systems.

**207. Spain** In Spain the legal starting point is similar to that in Germany; also here, in reality, it has to do with strict employer liability. Following art. 1903 (4) CC, owners or directors of undertakings or firms are responsible in respect of damage which has been caused by their employees whilst carrying out work in the areas for which they have been employed, or through the occasion of their activities. A corresponding rule is found in art. 120 (4) CP for criminal acts and violations of the law which employees or vicarious agents, representatives or managers commit in the carrying out of their duties or services. Liability after art. 1903 (4) CC is based originally on the concept of *culpa in eligendo vel in vigilando*.<sup>678</sup> In fact case law has withdrawn from the employer the possibility of exculpation by submission of contrary evidence in accordance with art. 1903 (6)<sup>679</sup> and arranged employer’s liability on an objective basis.<sup>680</sup> At the least, negligence of the vicarious

<sup>678</sup> T.S. 8th May 1999, RAJ 1999 (2) p. 4809, no. 3101, T.S. 31st March 1998, RAJ 1998 (1) p. 2882, no. 1855; T.S. 2nd July 1993, RAJ 1993 (3) p. 7328, no. 5789.

<sup>679</sup> T.S. 29th March 1996, RAJ 1996 (2) p. 2993, no. 2203.

<sup>680</sup> T.S. 29th March 1996, RAJ 1996 (2) p. 2993, no. 2203. The legal literature sees it likewise, compare *Cavanillas Música and Tapia Fernández*, La concurrencia de responsabilidad contractual y extracontractual. Tratamiento sustantivo y procesal (1992) 31, *Lacruz Berdejo*, Elementos de Derecho Civil, Vol. 2: Derecho de Obligaciones, 2. Part: Contratos y cuasicontratos. Delito y Cuasidelito. (1999) 525, de *Ángel Yagüez* in Paz-Ares/Díez-Picazo/Bercovitz/Salvador, Comentario del Código Civil, vol. II<sup>2</sup> (1993) 2013.

agent is required,<sup>681</sup> but even this is assumed following the general rules. The employer must consequentially prove that their vicarious agent has acted correctly.<sup>682</sup> Tortious employer liability is, as in Germany, narrower than the contractual, in as far as the former is limited to assistants who have a relationship of dependence (*relación de dependencia*) with the employer.<sup>683</sup> The liability has expanded to cover temporary assistants.<sup>684</sup> Tortious liability for independent subcontractors does not exist, however.<sup>685</sup>

**208. Austria** By today's standards the rule in Austrian law is also not unproblematic. If no obligation relationship exists between the injured party and the employer at the time of the harm occurring, the latter is only liable for so-called *agents*, and then only if an incompetent, or knowingly, a dangerous person is employed by the employer to take care of the latter's affairs (§ 1315 ABGB). The assistant is "incompetent" if he is unsuitable for the activity for which he is employed. It is therefore not enough if he makes an error carrying out his activity. The incompetence has to be habitual (for example a lack of training, natural abilities). The "danger" concerns the general human qualities of the agent.<sup>686</sup> As in Germany, in Austria as well it has come to numerous bypassing strategies, in order to side-step the essentially too narrow limits of § 1315 ABGB. To this belongs in particular an "escalation of contractual liability".<sup>687</sup> There are numerous special rules to be pointed out, for example in respect of the maintainer of a road, who must take responsibility for gross fault on the part of the employees (§ 1319a ABGB). Furthermore almost all recent laws on strict liability provide for an extended assistant's liability.<sup>688</sup> Furthermore so-called representative liability is attaining increasing practical significance.<sup>689</sup> Following this liability an employer is liable in tort law for the fault of a so-called *directing mind*, as it would be for its own.<sup>690</sup> A directing mind is a person with a management or supervisory position in the company of the employer.<sup>691</sup> People who merely carry out subordinate activities are not considered as directing minds.<sup>692</sup> For the people with a subordinate job, however, a culpable failure of the directing mind in respect of the duty to control can arise, for which the employer must take responsibility.<sup>693</sup> This representative liability carries particular weight today, because it is no longer

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<sup>681</sup> T.S. 5th October 1995, RAJ 1995 (4) p. 9407, no. 7020, T.S. 20th December 1996, RAJ 1996 (5) p. 12821, no. 9197.

<sup>682</sup> T.S. 7th November 1985, RAJ 1985 (2), p. 4464, no. 5516.

<sup>683</sup> *Lacruz Berdejo* loc.cit. 529.

<sup>684</sup> T.S. 23rd February 1976, RAJ 1976 (1), p. 677, no. 880 (loan of car to friend).

<sup>685</sup> T.S. 20th December 1996, RAJ 1996 (5) p. 12821, no. 9197; T.S. 4th April 1997, RAJ 1997 (2) p. 3998, no. 2639.

<sup>686</sup> *Koziol and Welser*, Bürgerliches Recht II<sup>12</sup> (2001) 334.

<sup>687</sup> *Harrer* in Schwimann, ABGB V<sup>2</sup> (1997) § 1295 no. 50.

<sup>688</sup> *Koziol*, Haftpflichtrecht II<sup>2</sup> (1984) 359 ff.

<sup>689</sup> *Koziol and Welser*, Bürgerliches Recht II<sup>12</sup> (2001) 335.

<sup>690</sup> OGH 7th June 1978 SZ 51/80 = JBl 1980, 482, note *Ostheim*.

<sup>691</sup> *Koziol*, Haftpflichtrecht II<sup>2</sup> (1984) p. 377. OGH 20th December 2000, RIS-Justiz RS 00091113.

<sup>692</sup> OGH 20. 12. 2000 RIS-Justiz RS 00091113.

<sup>693</sup> OGH 20. 12. 2000 RIS-Justiz RS 00091113.

just applicable to legal persons and companies,<sup>694</sup> but also to natural persons in their capacity as employers.<sup>695</sup>

**209. Sweden** In the Scandinavian legal systems the legal position is clearer, in as far as here without exception the principle of strict liability of the employer is applicable. It was, for example, statutorily fixed in chap. 3 § 1 of the Swedish Liability Act. Now as before, however, the exact outline of which persons are liable under the strict liability, causes problems. Following chap. 6 § 5 loc.cit. soldiers doing military service are to be treated as employees in the sense of chap. 3 § 1, likewise certain trainees and non-independent contractors. The problem of so-called “hired-employees” was the subject of HD of the 8th January 1992.<sup>696</sup> A company (K) rented from a different company (B) an experienced welder to do certain work for two weeks. The welder negligently caused fire damage to the plant of K. The HD deduced from an analysis of the factual circumstances of the case, that B, in a liability law sense, was still to be seen as the employer of the welder.<sup>697</sup> Liability as independent subcontractor was fundamentally excluded. An exception is provided by cases of so-called “non-delegable duties,” under which safeguarding duties of a house owner are counted, for example.<sup>698</sup>

**210. United Kingdom** The law of vicarious liability for a delict/tort is identical in English law and Scots law. It arises simply because the party in law vicariously liable stands in a particular relationship with the person who committed the delict/tort in the context of that relationship. The principal examples of relationships capable of giving rise to it are those of employer to employee and partnership to partner. There is neither a requirement to prove any form of fault on the part of the person vicariously liable, nor is there a defence that there was no fault on the part of that person. The liability has been developed as additional to the liability of the person who committed the delict/tort. There is *obiter* authority that there may be some situations of vicarious liability that would not additionally result in liability also of the person for whom there was vicarious liability.<sup>699</sup> But it is not clear when that would be the case. The question has been of significance in a case of economic loss arising from negligent misrepresentation by an employee with professional qualifications, where the employer was insolvent. There is authority that the employee is in such a case separately liable.<sup>700</sup> However, it may in future be argued that in such cases the employee does not have a duty of care to the person to whom the misrepresentation was made because the underlying relationship on the part of that person is with the employer company or firm, and not with the employee as an individual. On this view it would follow that the case is wrongly decided, and liability in such a case can only be a personal one of the company or firm, the employee

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<sup>694</sup> OGH 10.7.1997 SZ 70/138.

<sup>695</sup> OGH 12th September 2002, RIS-Justiz RS00091113.

<sup>696</sup> NJA 1992 p. 21.

<sup>697</sup> See on this also *Hellner and Johansson*, *Skadeståndsrätt*<sup>6</sup> (2000) 161; *Bengtsson and Strömbäck*, *Skadeståndslagen*. En kommentar (2002) 82.

<sup>698</sup> *Bengtsson and Strömbäck* loc.cit. 77.

<sup>699</sup> *Mattis v Pollock (trading as Flamingo's Nightclub)* [2003] EWCA Civ 887 per Judge L.J. at [33].

<sup>700</sup> *Merrett v Babb* [2001] Q.B. 1174.

not having committed a separate delict. Analytically that, however, would not be an example of vicarious liability. In personal injury cases arising from the negligence of employees the strict legal position is that the employee is also liable.<sup>701</sup> In practice, however, in the light of the compulsory insurance background, the employer as vicariously liable will be the person who pays the damages, and does not seek ever to recover them from the employee who committed the delict/tort. (Reflecting the different financial background, in cases of medical negligence by doctors it is normal for both the doctor and the entity within the National Health Service as employer to be sued together. Standing arrangements exist between the doctors' defence organisations, which act in effect as insurers, and the National Health Service with regard to who in fact pays the compensation.).<sup>702</sup> In partnership cases the individual partner is normally also sued. The obligation is joint and several, but an apportionment may be sought by the partnership determining its proportionate liability in a question with the partner who committed the delict/tort.<sup>703</sup> By far in a way the most important instance of vicarious liability is that of an employer for the delict/tort of his or her employee. Included, as employees are additionally workers who have been seconded to another employer by their general employer, if "entire control" has passed to the temporary employer, which will only be seen as arising in exceptional circumstances.<sup>704</sup> By analogy to the relationship of employer/employee the relationship of a company and its directors has been held likewise to give rise to vicarious liability on the part of the company for its director on company business.<sup>705</sup> A partnership, as noted above, is vicariously liable for its partners on partnership business,<sup>706</sup> though there is Scots authority that this does not apply where the claimant is himself or herself one of the partners.<sup>707</sup> Exceptionally a relationship where someone does an act as a favour for another, as in one case where a rally driver's car was being driven by a friend to the start of the rally, can give rise to liability for the delict/tort of the person so acting.<sup>708</sup> The relationship of car owner to car driver of itself is not one which is capable of giving rise to vicarious liability.<sup>709</sup> Nor is the relationship of parent to child, with the small exception that that result is in practice achieved in the statutory strict liability delict/tort of liability for damage by animals, through making the parent separately liable.<sup>710</sup> While it is recognised that the rationale for the core example of the employer/employee relationship being one capable of giving rise to liability is based on the policy rationale or enabling litigants in practice to be in a position to raise an action

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<sup>701</sup> *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555.

<sup>702</sup> These arrangements have changed at various times. Increasingly the National Health Service has carried the cost.

<sup>703</sup> *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48; [2002] 3 W.L.R. 1913.

<sup>704</sup> *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] A.C. 1.

<sup>705</sup> Confirmed as the law in the Scottish case *Scobie v Steel & Wilson* 1963 SLT (Notes) 45.

<sup>706</sup> Partnership Act 1890 section 10.

<sup>707</sup> *Mair v Wood* 1948 SC 83 (Court of Session, Scotland).

<sup>708</sup> *Ormrod v Colville Motor Services* [1953] 2 All ER 753. An earlier categorisation of such cases as "vicarious liability" for an agent has been convincingly criticised as too wide and misleading (See Tony Weir, *Tort Law* (2002) 97).

<sup>709</sup> *Launchbury v Morgans* [1973] A.C. 127.

<sup>710</sup> Animals Act 1971 (England); Animals (Scotland) Act 1987.

against a party with resources whether by insurance or otherwise, the range of relationships, as opposed to a consideration of when the delict/tort was committed within the context of one of the recognised relationships, is not open to extension on policy grounds.<sup>711</sup> Vicarious liability applies to all forms of tort/delict, including those of strict liability, for instance, defamation.<sup>712</sup> In the case of the vicarious liability of a partnership for its partners it has been held additionally to apply to “equitable wrongs” as developed in English law, supplementing the law of tort, such as dishonestly assisting a third party to breach a fiduciary duty.<sup>713</sup> As the law of vicarious liability of a partnership is statutory this was a question of interpretation of the phrase, “wrongful act” in the relevant legislation.<sup>714</sup> The common law governing employers’ liability, however, almost certainly likewise comprehends this in England. In Scots law there is no category of “equitable wrongs” and such acts of dishonesty<sup>715</sup> would fall within the law of delict anyway. To qualify as occurring within the context of that relationship in the core area, employer’s vicarious liability, the delict/tort must have been committed “within the scope of employment”.<sup>716</sup> The meaning of this requirement has given rise to an extensive case law, culminating in recent reconsideration of the law by the House of Lords. This has authoritatively determined that the test for this question is the same whatever the form of the delict/tort, and, in particular, is the same for cases of tort/delict requiring proof of intention to harm.<sup>717</sup> Vicarious liability of an employer can arise, accordingly, for assaults committed by an employee, including sexual assaults, and these are not by definition outside the “scope of employment”. The test applied to determine whether an act or omission is within the “scope of employment” has been difficult to formulate with precision. The approach that emerges from the two recent leading decisions is that the test is that there must be a sufficient connection between the act or omission in question and the background of the employment relationship.<sup>718</sup> A “broad approach” is taken to this.<sup>719</sup> It is recognised that a decision as to when this is or is not the case involves an “evaluative judgement”.<sup>720</sup> The test has been expressed with reference also to what is “fair and just” as one asking whether the delict/tort was “so closely connected with [the] employment that it would be fair and just to hold the employers vicariously liable.”<sup>721</sup> An

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<sup>711</sup> *Launchbury v Morgans* [1973] A.C. 127.

<sup>712</sup> See the Irish case, *Crofter Properties Ltd v Gen port Ltd* [2002] IEHC 94.

<sup>713</sup> *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48; [2002] 3 W.L.R. 1913 per Lord Nicholls of Birkenhead at [7]-[12].

<sup>714</sup> Partnership Act 1890 section 10.

<sup>715</sup> Though the range of equitable wrongs in England may be wider.

<sup>716</sup> An earlier phrase, “in the course of employment”, is probably now inaccurate (*Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215 per Lord Clyde at [40]).

<sup>717</sup> *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.

<sup>718</sup> Per Lord Clyde at [37], Lord Millett at [70]; *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48; [2002] 3 W.L.R. 1913.

<sup>719</sup> Per Lord Clyde at [42] – [43].

<sup>720</sup> *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48; [2002] 3 W.L.R. 1913 per Lord Nicholls of Birkenhead at [27].

<sup>721</sup> Per Lord Steyn at [28], Lord Clyde at [48].

alternative approach by a minority of the court,<sup>722</sup> in one of the cases, namely to test the question by asking what duty the employer had assumed in a general sense to the claimant and then examine whether the employer had *de facto* “entrusted” that duty to the employee who committed the delict/tort is considered incorrect, since it conflates inappropriately the question of the personal delictual/tortious liability of the employer with his vicarious liability. However, the approach does focus on the general risk of the tort that the employer’s business or activity brings with it as indicating what may “fairly and properly be regarded”<sup>723</sup> as being within the scope of employment, and thus reflecting the “policy” of vicarious liability in distributing risks. Consideration of “policy” in this sense has followed the lead given by the Canadian Supreme Court.<sup>724</sup> But, contrasting with the law as developed in Canada,<sup>725</sup> “policy” in the sense of considering the general balance of social and economic policy considerations as advantages and disadvantages to society of holding that there is or is not vicarious liability in the situation in question, is not relevant.<sup>726</sup> So the policy of encouraging vigilance on the part of employers or questions of the effect on future recruitment to the public services and so on are not considered. The determination of what amounts to a sufficient connection with the background employment relationship takes into account such factors, as the time when the delict/tort was committed, and the job description of the person in question. But none of these are conclusive in themselves, and in particular it is not possible for employers artificially to avoid vicarious liability potentially arising by prohibiting behaviour, or certain types of behaviour. The trend has been in marginal cases to find a sufficient connection with employment, and so vicarious liability. Employers have, in consequence, been held liable for sexual abuse of children by residential care workers,<sup>727</sup> and by teachers.<sup>728</sup> They have been held liable for thefts and frauds committed by employees. They have been held liable for negligent driving of motor vehicles when the employee was following a route that was a very significant detour for his or her own or another’s purposes.<sup>729</sup> Cases where it has been rejected are explained in effect on the ground there was no real connection at all with the employment, seeing it as providing a mere opportunity for the act or omission to happen. In one case of personal revenge taken by an employee on the claimant but not prompted by the employee’s role in the workplace was held not to give rise to vicarious liability.<sup>730</sup> But the tendency is still to

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<sup>722</sup> Lord Hobhouse at [55], also indicated as an aspect per Lord Millett at [82].

<sup>723</sup> *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48; [2002] 3 W.L.R. 1913 per Lord Nicholls of Birkenhead at [23].

<sup>724</sup> *Bazley v Curry* (1999) 174 D.L.R. (4<sup>th</sup>) 45 per McLachlin J at [26]-[36], cited per Lord Nicholls of Birkenhead at [23].

<sup>725</sup> *Jacobi v Griffiths* (1999) 174 D.L.R. (4<sup>th</sup>) 71 per Binne at [67]-[70].

<sup>726</sup> *Lister v Hesley Hall Ltd* per Lord Steyn at [27], Lord Hobhouse of Woodborough at [60].

<sup>727</sup> *Lister v Hesley Hall Ltd*.

<sup>728</sup> *Trotman v North Yorkshire County Council* [1999] LGR 584 (CA) overruled in *Lister v Hesley Hall Ltd*.

<sup>729</sup> *Williams v A & W Hemphill Ltd* 1966 SC (HL) 31.

<sup>730</sup> *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 (Australian High Court) – barmaid, not in charge of the bar throwing a glass of beer in the face of a customer – approved in *Lister v Hesley Hall*. But some other earlier decisions, where in effect a connection between employment and the act

find a connection as where a doorman at a nightclub “employed to keep order and discipline” knifed a customer.<sup>731</sup> A rule that there is no vicarious liability in a negligence case where an employee was at the time doing a job completely different from that which he or she was employed to do now must be seen as applying only subject to the qualification that the job being done was one requiring particular qualifications to be done safely, as in a case of handling explosives,<sup>732</sup> and that there was no other connecting factor, such as, for instance, acting in an emergency. In establishing the vicarious liability of a partnership for the delict/tort of a partner it is necessary to show that it was committed by the partner “acting in the ordinary course of the business of the firm”.<sup>733</sup> The approach to determining when this is established is the same as that for determining when in employer’s vicarious liability the tort/delict was committed within the scope of employment.<sup>734</sup> Likewise, the trend is to find that there is vicarious liability, as in the leading case<sup>735</sup> where a partner in a firm of solicitors assisted a fraud by third party in drawing up documentation to facilitate that fraud.

## (b) Contract law

211. **France and Belgium** Contractual liability, as has already been said, fundamentally extends further for assistants than non-contractual liability. In the French legal system the principle applies that the contractual debtor is also liable for the non-fulfilment of his contractual obligations, if the contractual non-fulfilment is caused by a person who the contractual debtor has employed to fulfil his obligations.<sup>736</sup> In the French academia it is pointed out though, that with the setting in stone of this *responsabilité contractuelle du fait d’autrui*, the *obligations de moyens* and the *obligations de résultat* of the contractual debtor have to be differentiated. If there is an *obligation de résultat* for the contractual debtor, the contractual obligee merely has to prove that the result owed has not been achieved. If there is an *obligation de moyens* for the contractual debtor on the other hand, the contractual obligee has to prove that the *exécutant* has made an error.<sup>737</sup> The principle also applies in the Belgian legal system, that the contractual debtor is liable for persons whom he employed to carry out his contractual obligations.<sup>738</sup>

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was disregarded may now be seen as incorrect in particular *eppel v Saad bin Ahmad* [1974] 1 W.L.R. 1082 – bus conductor hitting passenger in the face when passenger remonstrated with him about his extreme rudeness to another passenger.

<sup>731</sup> *Mattis v Pollock (trading as Flamingo’s Nightclub)* [2003] EWCA Civ 887.

<sup>732</sup> *Kirby v NCB* 1958 Sc 514, approved in *Lister v Hesley Hall Ltd*.

<sup>733</sup> Partnership Act 1890 section 10.

<sup>734</sup> *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48; [2002] 3 W.L.R. 1913.

<sup>735</sup> *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48; [2002] 3 W.L.R. 1913.

<sup>736</sup> Cass.civ. 29th May 1963, *Gaz. Pal.* 1963 (2<sup>e</sup> sem.) *jur.*, p. 290 («le débiteur est responsable de l’inexécution de ses obligations, alors même que cette inexécution proviendrait du fait d’un tiers qu’il se serait substitué»).

<sup>737</sup> *Terré/Simler/Lequette*, *Les obligations*<sup>8</sup>, no. 585, p. 565-567.

<sup>738</sup> B.H. Verb. (-Claessens) II-4, nos. 1763-1771.

212. **Italy and Germany** Art. 1228 of the Italian CC (liability for assistants) confirms that a debtor who commands the activities of third parties to fulfil his obligations, is also liable for their deliberate or negligent conduct, as long as the parties have not agreed upon an arrangement to the contrary. The debtor is liable independent of his own fault,<sup>739</sup> for the damage which an assistant culpably causes to the obligee.<sup>740</sup> The pre-existence of an obligation relationship between the obligee and the debtor allows the liability to be conceived as contractual, otherwise it would be seen as tortious. The case in art. 1588 (2) CC is similar. The German legal system in § 278 BGB states exactly the same. If there is already an obligation relationship in existence between the parties at the time of the damaging event, and if the damaging conduct appears to be the non-performance of this obligation, then there is strict liability for the debtor in relation to the damage caused by his *assistants in performance*. “Assistants in performance” in the sense of this provision, can also be independent subcontractors.

213. **Spain** In Spain the situation of the legal sources is somewhat confused, because there is a lack of a general rule on contractual liability for assistants. The academia and case law are in accordance, however, that the debtor is liable not only for his own actions, but following the principle of the more objective *culpa in eligendo vel vigilando*, also for those of his assistants.<sup>741</sup> Statutes themselves confirm this principle for a few particular situations, for example in art. 1564 CC (liability of a tenant for property damage caused by persons in his household), art. 1596 CC (liability of a contractor for persons employed by him for the work), art. 1721 CC (liability of a representative for representatives named by him) and art. 1784 CC (pub landlord liability for staff). Independent contractors can also be assistants in performance.<sup>742</sup> It is not decisive whether or not the employer is at fault,<sup>743</sup> it depends much more, as in tort law, on the fault of the assistant.<sup>744</sup>

214. **Portugal** Following art. 800 (1) of the Portuguese CC “the debtor is liable in respect of the obligee for the actions of his legal representatives or of persons whom he has appointed for the fulfilment of his obligation, as if these actions were carried out by the debtor himself.”<sup>745</sup> Further contract law provisions involve more precisely liability for assistants (*substitutos* or *auxiliares*), for example arts. 1197 and 1198 (safeguarding contract), art. 1213 (subcontractor contract), art. 1165 (substitutes and assistants in the

<sup>739</sup> *Visintini*, L'inadempimento delle obbligazioni, Trattato di diritto privato diretto da Rescigno, 9, Obbligazioni e contratti, Tomo primo (1992), 224.

<sup>740</sup> *De Cupis*, Il danno, Teoria generale della responsabilità civile (1979) 164; Cass. 8th May 2001, n. 6386, Giust. civ. Mass. 2001, 942.

<sup>741</sup> T.S. 1st March 1990, RAJ 1990 (2) p. 2190, no. 1656.

<sup>742</sup> SAP Cordoba 26th January 2001, AC 2001, no. 14; SAP Asturias 11th December 1998, AC 1998, no. 2365. This case law covers the leading opinion in legal literature.

<sup>743</sup> *Lacruz Berdejo*, Elementos de Derecho Civil, Vol. 2: Derecho de Obligaciones, 1. Part: Parte General. Teoría General del Contrato. (1999) 174.

<sup>744</sup> T.S. 1st March 1990, RAJ 1990 (2) p. 2190, no. 1656.

<sup>745</sup> English translation in [www.eurofound.eu.int](http://www.eurofound.eu.int).

area of other service contracts).<sup>746</sup> The debtor is liable independent of his own fault,<sup>747</sup> a rule which is of a dispositive nature, though (art. 800 (2) CC).

**215. Greece** In Greece also, the difference between tortious (art. 922 CC) and contractual (art. 334 CC) liability for assistants is mainly seen as being, that in the case of the latter there must have been an obligation relationship between the employer and the injured party at the time of the damaging conduct. A breach of a duty from the obligation relationship is therefore required; the fault of the assistant counts as the fault of the employer. In the leading legal view, in contrast to Germany, obligation relationships without a primary performance duty (like that from *culpa in contrahendo*, art. 197 CC) are not sufficient for art. 334 CC. In this respect art. 922 CC is to be used.<sup>748</sup> Art. 334, on the other hand, is applicable if safeguarding duties within an obligation relationship with a primary performance duty are breached.<sup>749</sup> For the application of art. 334 it is further necessary that the conduct of the assistant carries out the achievement of the performance. Under this come not only core and secondary performance duties, but also safeguard or care duties. In contrast to art. 922, under art. 334 CC there is liability for subcontractors.<sup>750</sup>

**216. Austria** The legal situation in Austria is largely similar to that of the remaining jurisdictions of the EU. A person who is obliged to perform for another, is liable to him for the fault of his legal representatives as well as for persons whom he uses to fulfil his obligations, as he would be for his own fault (so-called assistant to performance, § 1313a ABGB). The liability requires an existing obligation relationship. In contrast to Greece and likewise to Germany, the employer has to make good for the breach of a safeguard duty from the pre-contractual obligation relationship, following contractual principles. Moreover, the employer is liable for the wrong conduct of an assistant in accordance with § 1313a ABGB and not merely following § 1315 ABGB.<sup>751</sup> Not only dependant parties are included as assistants to performance, but rather independent assistants to the performance of another can also be included.<sup>752</sup> What is decisive, is that the assistant works for the debtor and the latter has the authority to issue instructions.<sup>753</sup> The employer is liable for damage which has a close connection to the performance. It can involve the breach of main, subsidiary or safeguard duties. If the assistant who caused the damage

<sup>746</sup> Further *Pessoa Jorge*, *Ensaio sobre os pressupostos da responsabilidade civil* (1968), *passim*.

<sup>747</sup> STJ 13th December 2000 CJ(ST) VIII (2000-3) 165, 168.

<sup>748</sup> Georgiades/Stathopoulos (-*Stathopoulos*), Art. 334, no. 13.

<sup>749</sup> *Stathopoulos*, loc.cit. nos. 13 and 27.

<sup>750</sup> *Gasis*, *Peri tin ennoian tou voithou ekpliroseos kai tou prostithentos*, in: commemorative publication for Maridakis, Bd. II, p. 227, 262.

<sup>751</sup> OGH 7.7.1978 SZ 51/111; *Koziol/Welser*, *Bürgerliches Recht* II<sup>12</sup> (2001) 332; *Koziol*, *Haftpflichtrecht* II<sup>2</sup> (1984) 337; *Harrer* in *Schwimann*, ABGB VII<sup>2</sup> (1997) § 1313a no. 16; in result also *Reischauer* in *Rummel-ABGB* I<sup>3</sup> (2000) Introduction to §§ 918-933 no. 14.

<sup>752</sup> OGH 3.9.1986 JBl 1986, 789 = RIS-Justiz RS 0028729; *Koziol*, *Haftpflichtrecht* II<sup>2</sup> (1984) 340.

<sup>753</sup> OGH 14.5.1996 SZ 69/115, = RIS-Justiz RS 0028447.

was only occasionally involved in the performance, the employer is only liable under § 1315 ABGB.<sup>754</sup>

217. **Sweden** In Sweden, also, contractual liability for assistants stretches further than tortious liability, because it also includes liability for independent contractors.<sup>755</sup> The so-called “control liability” following §§ 27 (2), § 40 (1) sales law [*köplag* (1990:931)], §§ 14 (2), 30 (2) consumer sales law [*konsumentköplag* (1990:932)] and § 31 (1) and (2) consumer service law [*konsumenttjänstlag* (1985:716)] even recognize liability for suppliers and other persons on a higher level of the same contract chain. Also transporters, warehouses and consultants can be included by this liability.<sup>756</sup> It only affects, however, the breach of specific performance duties, not the breach of general safeguard and care duties.<sup>757</sup>

218. **United Kingdom** Neither English law nor Scots law recognise as such a category that can be denominated as vicarious liability for breach of contract. However, there are a number of rules that to some extent can be seen as functioning to achieve in a limited way the same result. These rules, however, are not correctly seen as vicarious liability in the sense that phrase is understood in English and Scots law as liability arising purely derivatively from standing in a certain relationship to a person. They are classified as examples of personal liability and comprise situations where personal liability arises under the contract itself for breach of an express or implied term (or in cases of bailment in England from a non-delegable legal duty). It is trite that the acts and omissions of the employees of a party who is debtor in a contractual obligation in connection with the performance of it are treated as being the acts of that party in question as to whether he has or has not performed his obligations under the contract. Where an obligation to perform is validly sub-contracted by the debtor in the obligation, the debtor in the obligation remains liable for breach of the contract through failure to perform that obligation. In contracts, such as building contracts, where a particular outcome of performance is contracted for, the contractor will be liable if his sub-contractor fails to produce that outcome. In contracts of services for work to be carried out on property of the creditor where the debtor validly sub-contracts that work, the debtor is liable in respect of damage to that property by the negligence of the sub-contractor, if he had been negligent in the selection of the sub-contractor and so was in breach of the implied

<sup>754</sup> OGH 3.12.1981 JBl 1983, 255; *Harrer* in Schwimann, ABGB VII<sup>2</sup> § 1313a no. 22 ff.

<sup>755</sup> *Hellner*, *Speciell avtalsrätt. Vol II. Kontraktsrätt. Part 2: Allmänna ämnen*<sup>3</sup> (1996) 202. See further HD 5th July 1943, NJA 1943 p. 356 (liability of the seller of hydrochloric acid for damage which the independant transporter had negligently caused in the house of the purchaser).

<sup>756</sup> *Bengtsson and Strömbäck*, *Skadeståndslagen. En kommentar* (2002) 77.

<sup>757</sup> *Hellner and Johansson*, *Skadeståndsrätt*<sup>6</sup> (2000) 164. See also HD 26th October 1940, NJA 1940 p. 550: The plaintiff was injured in the hair dressing salon of the defendant by a falling marble board which an experienced independant craftsman had constructed. Then as today in such a case the craftsman did/would have the liability, not the hair salon as well. This is because it did not involve the breach of a particular performance duty on the part of the hair dresser, but rather the breach of a contractually unspecific safety obligation.

obligation in such a contract to take reasonable care for the safety of the property.<sup>758</sup> The same applies in a non-gratuitous contract for the safekeeping of goods. But, additionally there can be liability in such a situation in respect of the negligence of a third party to whom the debtor entrusted the goods even without the debtor having been negligent in the selection of that third party. In Scots law this is based on an implied obligation in the contract of custody. In English law it is based on a rule in the law of bailment, which is associated with tort, and explained on the ground that there is a non-delegable personal legal duty on the party of the debtor in the obligation (the bailee) to the creditor in the obligation to take reasonable care of the property.<sup>759</sup> These obligations arising under contract in respect of sub-contractors cannot be avoided by instead of sub-contracting, assigning the obligation to perform, since they are not within the limited class of contractual obligations in English law that have been recognised as assignable.<sup>760</sup> This is also the case in Scotland: while the view has been expressed that some executory contracts may be assignable,<sup>761</sup> no case exists where this was recognised in a situation where there was breach of the contract by the party to whom the obligations were assigned.<sup>762</sup>

## (8.) Reduction or Exclusion of Liability

**219. Introduction** Even questions about the reduction or exclusion of liability can be posed in a different manner, depending upon whether they involve tortious or contractual liability. In greater detail, in both cases, however, statutory liability reduction clauses and contractual exclusion of liability have to be differentiated. Under statutory reduction clauses, measures which enable the judge to reduce the extent of the liability through equity, are to be understood. Contractual liability modifications, on the other hand, only raise questions in as far as they were already agreed before the damaging event. Subsequent agreements on the extent of liability, on the other hand, are in principle unproblematic. In the following text the widespread possibility of a reduction made by a judge in the case of excessively high contractual penal agreements will not be discussed.<sup>763</sup> For the remainder it depends upon the concurrence of actions rules which are to be dealt with later, whether a raised contractual liability standard replaces a lowered tortious standard (example: the liability, limited to gross negligence, of a maintainer of a road in Austrian tort law [§ 1319a ABGB] does not play a role on motorways which demand an annual toll sticker, because the receiver of the road toll is liable for every fault as a result of the contract concluded with every road user).

<sup>758</sup> See the Scottish case, *Stevenson & Sons Ltd v Maule* 1920 SC 335 per Lord Cullen at 350.

<sup>759</sup> *E McKendrick*, 'Vicarious Liability and Independent Contractors: A re-examination' (1990) 63 MLR 77.

<sup>760</sup> *M P Furmston*, 'The Assignment of Contractual Burdens' (1998) 13 Journal of Contract Law 42; *H O Hunter* (1998) 13 Journal of Contract Law 42.

<sup>761</sup> *W McBryde*, *The Law of Contract in Scotland*<sup>2</sup> (2001) 12-50.

<sup>762</sup> In the only clear case *Cole v C H Handasyde & Co* 1910 SC 68 the question was whether the assignee was entitled to perform the obligation.

<sup>763</sup> See on this the notes under art. 9:509 PECL.

## (a) Tort law

220. **Statutory clauses enabling reduction of liability** Statutory reduction clauses in the sense already mentioned are by no way recognized by all tort laws in the European Union. In Austria, Italy and the United Kingdom, for example, they are totally unknown and in Belgium, France and Luxembourg they only apply in the law of *gestion d'affaires* (art. 1374 [2] CC), and not in tort law; art. 1374 (2) CC is interpreted as *très exceptionnelle*, because it differs from general liability principles.<sup>764</sup> Germany does not recognize a reduction clause either. It follows much more an “all or nothing principle”, which essentially is only diluted if the injured party was also responsible for the damage (§ 254 BGB). The authors of the BGB expressly decided against earlier (and scattered in special provisions such as §§ 429-435 HGB still applicable) rules, which at least limited the compensation of the tortfeasor to parts of the damage in the case of minor fault. Proposals to put a reduction clause in the BGB have never been successful.<sup>765</sup>

221. **Spain** In the Spanish law of obligations, with art. 1103 CC a reduction clause is discussed in contract law, but not in tort law, but for the latter a corresponding application of art. 1103 CC has been discussed. Opinions are split<sup>766</sup>, and this is the case even within the case law of the *Tribunal Supremo*.<sup>767</sup> It is therefore still an unsolved problem.

222. **Portugal** Portugal is a country with a tortious liability reduction clause. Art. 494 of the Portuguese CC determines: “If the liability is based on negligence, following approved judgement the duty to compensate can be lowered, in terms of the sum, to that of one lower than the damage caused, as long as the degree of fault of the tortfeasor, his own economic situation and that of the injured party, and other circumstances of the case justify this.” The possibility of reducing the amount of compensation is limited to cases of negligence. If the defendant has acted deliberately, a reduction of the compensation is generally excluded, if further circumstances of a particular case are not involved. Art. 494 CC is on the other hand, as comes to light from art. 499 CC, applicable also in the area of strict liability, particularly in the area of liability for traffic accidents.<sup>768</sup> The reduction clause of art. 494 should only be used if the duty to provide full compensation would be

<sup>764</sup> *Mazeaud and Chabas*, Obligations<sup>9</sup>, no. 687 p. 814; JClCiv (-Bout), Art. 1372-1375, V° Quasi-Contrats, Fasc. 20, no. 38-39.

<sup>765</sup> *Medicus*, Schuldrecht I AT<sup>13</sup>, no. 585.

<sup>766</sup> Against the possibility of an analogous conclusion, amongst others *Díaz Alabart* in *Comentarios al Código Civil y Compilaciones Forales* (ed. by Albadalejo), vol. 15, part 1 (1989) 510; in favour *Pantaleón Prieto* in *Paz-Ares/Díez-Picazo/Bercovitz/Salvador*, *Comentario del Código Civil*, vol. II<sup>2</sup> (1993) 1999.

<sup>767</sup> The recent case law appears to have a tendency towards a corresponding application of art. 1103 CC: T.S. 20th June 1989, RAJ 1989 (4) p. 5438, no. 4702 and T.S. 19th July 1996 (3) p. 7665, no. 5803. Different view however, still T.S. 5th December 1983, RAJ 1983 (2) p. 5228, no. 6821.

<sup>768</sup> See amongst others STJ 2nd December 1992 BolMinJus 422 (1993) p. 280, 285-286 and *Antunes Varela*, *Obrigações em Geral* I<sup>10</sup> 693.

manifestly unjust (*injusta*).<sup>769</sup> A particular measure on art. 494 is art. 489 of the Portuguese CC, which concerns the liability of persons not responsible for their actions.

**223. The Netherlands** In art. 6:109 BW Dutch law also has at its disposal a general reduction clause (*matigingsrecht*). It gives a discretionary power to the judge to reduce the extent of liability, taking into account the kind of liability, the legal relations between the parties and their economic situation. The application of this reduction clause particularly comes into consideration if liability without fault is involved. The smaller the fault, the more likely the reduction clause will be applied. The application of the reduction clause is also different according to the type of damage (for example, a reduction in the case of pure economic loss comes into consideration sooner than for bodily harm).

**224. Sweden** Swedish law also recognizes a general reduction clause. Chap. 6 § 2 of the Liability Act [*skadeståndslag* (1972:207)] reads: "If the duty to compensate is a disproportionate detriment for the person bound to compensate taking into consideration his economic situation, the duty to compensate can be reduced according to equitable discretion, whereby the necessity of the compensation for the injured party, as well as remaining circumstances, are to be considered." In the framework of this reduction clause attention is directed first of all to the tortfeasor and then to the injured party.<sup>770</sup> In contrast, for example, to § 70 (2) of the sales law, chap. 6 § 2 of the Liability Act is not focused on the conduct of the person with the duty to compensate, but instead on a disproportionate disadvantage for him ("pardoning paragraph"<sup>771</sup>). The provision is applied in all liability cases which come under the Liability Act, but can also be applied for liability under particular laws, under liability developed by judges and also contractual liability.<sup>772</sup> Whether and under which requirements it should be present in the law of strict liability, the legislature has left to the case law.<sup>773</sup> If a party has at their disposal insurance protection which goes above what is necessary to cover the damage, this is not subject to liability reduction. An unreasonable disadvantage is missing in this case. Chap. 6 § 2 Liability Act is an exceptional regulation. It attempts to maintain, if possible, the living standard of an average family and prevent, for example, someone having to sell their own home in order to fulfil a duty to compensate. To add to this equation, however, are also the economic circumstances of the injured party. If they are bad, the injured party has, according to the circumstances, to bear a disproportionate disadvantage. Difficult questions are posed in the case of deliberately committed torts, and this is not least because the living standard of many petty criminals tends to fall fundamentally short of that of an average family anyway. In the grounds for the law is the comment that in cases of intention a reduction should fundamentally not come into consideration, although social and humanitarian points, in particular the rehabilitation of a criminal, have to form part of the weighing up process.<sup>774</sup> The case law has dealt with

<sup>769</sup> CA Coimbra 10th December 1985, CJ X (1985-5) p. 34.

<sup>770</sup> Witte, Landesbericht Schweden, in: von Bar (ed.), *Deliktsrecht in Europa* (1993) 84.

<sup>771</sup> Hellner and Johansson, *Skadeståndsrätt*<sup>6</sup> (2000) 434.

<sup>772</sup> Hellner and Johansson loc.cit. 434; HD 3 February 1978, NJA 1978 p. 14.

<sup>773</sup> Hellner and Johansson loc.cit. 434.

this complex of problems on numerous occasions, and for instance, has considered in favour of a deliberately acting “thug,” that the victim had a claim to funds for the damage to victims from criminal acts.<sup>775</sup> In the case of a systematic and almost “commercial” act of theft, the possibility of a reduction of liability is, however, denied.<sup>776</sup> Chapter 3 § 6 Liability Act finally contains a particular reduction rule for the area of employer liability. It concerns property damage and refers expressly to existing insurance or insurance possibilities.

**225. Contractual restrictions of tortious liability** The question of whether, and should the situation arise, to what extent contractual agreed exemptions from tortious liability are possible, is of significant practical importance. The answers to these questions point out the large differences in the legal systems of the European Union. The European Community law itself has to some extent contributed to harmonisation of the laws of the member states. At least it can be recorded, that art. 12 of the Product Liability Directive 85/374 of 25th July 1985, art. 5 (2) 4 of the Package Travel Directive 90/314 of 13th June 1990 and art. 3 (1) and Annex 1 lit. a of the Unfair Contract Terms Directive 93/13 of 5th April 1993 all prohibit disclaimers of liability for personal injury, and that in the case of damage to property, liability under the Product Liability Directive is mandatory as well.

**226. France and Belgium** Following constant case law of the French *Cour de Cassation* tortious liability is *d'ordre public* so that contractually it can neither be excluded nor reduced beforehand.<sup>777</sup> This applies as much to rules in general terms of business as to individual agreements. The Belgian *Cour de Cassation* has not followed this view, however. It does not count the liability from art. 1382 ff CC as belonging to the Belgian public order. Consequently a contractually agreed liability reduction or exemption is in principle possible. Exemptions of liability before an event, due to the intention to cause damage are excluded however; they are void generally. Agreements to exclude liability which contravene the law are void, as are those which would make a contractual obligation pointless.<sup>778</sup>

**227. Austria** For Austrian law it is pointed out that exemption clauses in relation to non-contractual liability, in terms of their content, mostly contain at the same time an exemption or attempt at exemption from liability due to “a positive breach of con-

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<sup>774</sup> Hellner and Johansson loc.cit. 437.

<sup>775</sup> HD NJA 1990 p. 196.

<sup>776</sup> HD NJA 1992 p. 660.

<sup>777</sup> Fundamental Cass.civ. 12th February 1955, JCP 1955, II, 8951, note René Rodière: («sont nulles les clauses d'exonération ou d'atténuation de responsabilité en matière délictuelle, les articles 1382 et 1383 du Code civil étant d'ordre public et leur application ne pouvant être paralysée d'avance par une convention»). See Viney, Introduction à la responsabilité<sup>2</sup>, no. 173 p. 305-307.

<sup>778</sup> Further Vandenberghe/Van Quickenborne/Wynant, Aansprakelijkheid uit onrechtmatige daad (1985-1993), TPR 1995, no. 35 p. 1226-1227.

tract,<sup>779</sup> which as a consequence can raise difficult questions on systematic delimitation of the boundary between tortious and contractual liability. A general law on the regulation of questions in relation to the effectiveness of general terms of business does not exist in Austria. The case law has the tendency to qualify an exemption from liability for bodily harm in general terms of business, as the gross disadvantaging of the other party and therefore holds it as being void even if it merely refers to liability for slight negligence.<sup>780</sup> Liability for property damage, on the other hand, can be excluded in standard terms and conditions at any rate for cases of slight negligence (and within the framework of individual agreements in the domain of courtesy relationships, even to the extent of gross negligence).<sup>781</sup> For the remainder, it is the case that nobody can withdraw from legal liability by means of a one-sided declaration. One-sided declarations can destroy the basis of trust, however, which in an individual case can be the basis of liability, for example with the granting of information or where the public is granted entry into certain premises, the dangerousness of which is pointed out.<sup>782</sup>

**228. Italy** Art. 1229 of the Italian CC contains a regulation for clauses of exemption or reduction from liability in respect of the liability from a contract: “(1) Any agreement which, in advance, excludes or limits the liability of the debtor for fraud, malice or gross negligence is void. (2) Any agreement which, in advance, exonerates from or limits liability in cases in which the act of the debtor or his auxiliaries constitutes a violation of a duty arising from rules of public policy is also void.” That led to the much discussed question, of whether art. 1229 CC can also be applied in tort law. The response of the legal literature is mostly<sup>783</sup> positive.<sup>784</sup> At the same time it is also admittedly said by the authors of this group, that all liability for injuries to the physical integrity of a person is immune from exemption; it is based in the Italian public order (para (2)).<sup>785</sup> The opponents of a corresponding application of art. 1229 CC are inclined towards the French legal view, in which the entire non-contractual liability is *d’ordre public* and they see in the conclusive nature of the liability under the Product Liability Directive, merely confirmation of this principle.<sup>786</sup> From this perspective it then decisively depends on whether the liability in the individual case shows itself to be contractual or tortious.

**229. Spain** In Spain also, there appears to be a lack of case law up until now, which would explain the problem of the effectiveness of a contractual exemption from tortious

<sup>779</sup> *Krejci in Rummel-ABGB II*<sup>3</sup> (2002), § 6 KSchG no. 121.

<sup>780</sup> OGH 24th March 1998, SZ 71/58.

<sup>781</sup> *Koziol, Haftpflichtrecht I*<sup>3</sup> (1997), Nr. 18/35 ff, p. 558.

<sup>782</sup> If it involves liability for paths/roads, § 1319a ABGB already provides for the limitation of the liability to gross fault.

<sup>783</sup> Differing, however, e.g., *Costruzione di autoveicoli, clausole di esonero e responsabilità dell’impresa per una diversa lettura dell’art. 2054 u.c. c.c.*, *Giur. it.* 1975, I, 1, 751 ff.

<sup>784</sup> Further and with more demonstrations *Bianca*, *Diritto civile*, 5, *La responsabilità* (1994) 66; *Monateri*, *Responsabilità civile*, 678.

<sup>785</sup> *Cabella Pisu*, *L’inadempimento delle obbligazioni*, *Trattato di diritto privato diretto da Rescigno*, 9, *Obbligazioni e contratti*, Tomo I (1992) 229.

<sup>786</sup> *Castronovo*, *Problema e sistema nel danno da prodotti*, cit. 536.

liability. As far as is clear, this question has only been discussed in legal literature up to this point. The leading academic opinions appear to hold an exemption of liability in the non-contractual area as being, in principle, possible (for example, in relation to the neighbours of a factory whose land could be polluted with the emission of harmful substances), as long as it does not involve liability from intention.<sup>787</sup> This is in accordance with the rule on exemption of contractual liability in art. 1255 of the Spanish CC.

**230. Portugal** The Portuguese law of general terms of business expressly prohibits clauses with liability limitations or exemption for certain cases. Measures regulating questions of so-called *cláusulas contratuais gerais* were introduced through the Decreto-Lei (statutory decree) no. 446/85 of 25. 10. 1985. The EC Directive 93/13/EEC on the unfair use of clauses in consumer contracts was then added with Decreto-Lei No. 220/95 of the 31st August 1995 into the aforementioned law, which was later again changed through Decreto-Lei No. 249/99 of the 7th July 1999. After the law, general terms of business are absolutely forbidden (art. 18) and void (art. 12), if they aim in a direct or indirect way at excluding or limiting (i) liability for injury to life, moral and bodily integrity or health (art. 18 lit. a); (ii) non-contractual liability for property damage (art. 18 lit. b); and (iii) in the case of intention or gross negligence, the liability for definitive non-performance, delay or bad performance (art. 18, lit. c), each including liability for the actions of representatives and assistants (art. 18, lit. d). Such *cláusulas absolutamente proibidas* are void in respect of other commercial enterprises (art. 17), as well as in respect of consumers (art. 20).<sup>788</sup>

**231. Germany** The starting point for German law is that contractual limitations of liability are in principle also permissible in the area of tort law.<sup>789</sup> Conceivable objects of clauses limiting liability could be particular types of damage (to persons or property) or amounts of damage (such as the laying down of moderate maximums). In this respect the limits in §§ 307 (1), 307 (2) no. 2 and 309 no. 7 BGB (prohibition of clauses without possibility of evaluation on merits) are to be noted. Under § 309 no. 7 BGB a standard form exemption of liability from gross fault (intention, gross negligence) is generally void. A standard form exemption from liability for negligently causing death or injuries to body or health injuries is also void. The regulation of § 276 (3) BGB, in which liability due to the intention of the debtor can also not be waived in advance in the way of an individual agreement, means that even reasonable sum liability restrictions are void.<sup>790</sup> Further limits to permissibility are contained in §§ 134, 138, 242 BGB as well as some

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<sup>787</sup> *Cavanillas Múgica and Tapia Fernández*, La concurrencia de responsabilidad contractual y extracontractual. Tratamiento sustantivo y procesal (1992) 57; *Lacruz Berdejo*, Elementos de Derecho Civil, Vol. II: Derecho de Obligaciones, Part 2: Contratos y cuasicontratos. Delito y Cuasidelito. (1999) 515 and *Santos Briz* in *Comentarios al Código Civil y Compilaciones Forales* (ed. by Albadalejo), Vol. 24 (1984) 109.

<sup>788</sup> Further *Almeno de Sá*, Cláusulas contratuais gerais e Directiva sobre cláusulas abusivas (2001) 75 ff.

<sup>789</sup> RG 13th October 1916, RGZ 88, 433, 436; BGH 28 April 1953, BGHZ 9, 301, 306.

<sup>790</sup> *Palandt-Heinrichs*, BGB<sup>62</sup>, § 276, no. 35.

special provisions, for instance § 7 HaftPflG, § 8 a (2) StVG, § 49 LuftVG, § 14 Product Liability Law. Exemption clauses are in principle narrow and are to be interpreted to the detriment of whoever wants to reduce their liability.<sup>791</sup> That is applied to standard form clauses by § 305 c BGB. Hence, where doubt arises, a reduction in liability in the case of a guarantee does not include tortious liability.<sup>792</sup> For liability exemption clauses in individual agreements the corresponding applies; they are also narrow in principle and to be interpreted against the person who wants to do away with the liability.<sup>793</sup>

**232. United Kingdom** In both England and Scotland the validity of a provision excluding or limiting liability for delict/tort (except in so far as additionally or separately affected by legislation following on the EC Directives noted above in paragraph 223) is, despite its name, governed by the Unfair Contract Terms Act 1977. This statute contains separate provisions for England<sup>794</sup> and for Scotland<sup>795</sup> to reflect the different terminology of the law of obligations in the two jurisdictions; the substance of these different statutory provisions is, however, in essence the same. There is no control as such at common law in either jurisdiction.<sup>796</sup> There is, though, a specific rule at common law in both England<sup>797</sup> and Scotland<sup>798</sup> that a party cannot exclude liability for his own fraud inducing contract with the other party. In England<sup>799</sup> there is authority that this also applies to an attempt to exclude liability for fraud in the performance of the contract. It may be that the rule applies more widely, to prevent the exclusion of liability for any intentional (or reckless) wrongdoing,<sup>800</sup> though not vicarious liability for that on the part of an employee.<sup>801</sup> The common law may perhaps, further, still play a limited role in one other respect. It may still be the law,<sup>802</sup> despite recent dicta in the House of Lords to

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<sup>791</sup> Continual case law: BGH 29th October 1956, BGHZ 22, 90, 96; BGH 11th July 1963, BGHZ 40, 65, 69; BGH 5th April 1967, BGHZ 47, 312, 318; BGH 11th March 1986, NJW 1986, 2757, 2758.

<sup>792</sup> BGH 5th May 1992, NJW 1992, 2016, 2017.

<sup>793</sup> BGH 10th October 1977, NJW 1978, 261.

<sup>794</sup> Unfair Contract Terms Act 1977 Part I.

<sup>795</sup> Unfair Contract Terms Act 1977 Part II.

<sup>796</sup> A suggestion at one time in Scots law (*McKay v Scottish Airways* 1948 SC 248 per Lord President Cooper at 363) that there might be situations where a exemption clause in a contract was so “extreme” as to be invalid either as “depriv[ing] the contract of all meaning” or “contrary to public policy” has not been followed.

<sup>797</sup> *S. Pearson & Son Ltd v Dublin Corporation* [1907] A.C. 351. Also Misrepresentation Act 1967 section 3.

<sup>798</sup> *Boyd & Forrest v Glasgow and S. W Rly Co* 1915 SC (HL) 35-36 per Lord Shaw of Dunfermline.

<sup>799</sup> Cf for Scotland *McBryde, The Law of Contract in Scotland* (2<sup>nd</sup> ed) 14-85 – 14-87, where the question is not considered.

<sup>800</sup> *Unfair Terms in Contracts* Law Commission Consultation Paper 166/Scottish Law Commission Discussion Paper 119 (2002) para 4.49 footnote 54 citing Chitty, *Contract* 6-129.

<sup>801</sup> As in *Photo Production Ltd v Securicor Transport* [1980] A.C. 827.

<sup>802</sup> *Canada Steamship Lines Ltd v The King* [1952] A.C. 192 per Lord Morton of Henryton at 208, applied in *Smith v South Wales Switchgear Ltd* [1978] 1 W.L.R. 165 (House of Lords).

the contrary,<sup>803</sup> that if it is alleged that an exclusion (as opposed to a limitation)<sup>804</sup> provision covers negligence, a particularly severe approach to interpretation of that provision will be taken by the court, construing it *contra proferentem* against the party seeking to rely as so to interpret it as not covering that if there is the slightest ambiguity. If still valid, the rule in this context is that if the exclusion provision does not expressly refer to negligence, and there is any doubt as to whether the words otherwise are wide enough to cover it, the provision will be interpreted as not covering it. Moreover even if the words are so interpreted they will not be held as doing so if they can be read as referring to some other ground of liability.<sup>805</sup> As the approach is out of line with the recent trend to contextual and non-technical interpretation of contractual provisions of other types,<sup>806</sup> and dating as it does from before the passing of the Unfair Contract Terms Act 1977, even if still valid, it may be that in future it will be less technically applied. The Act controls exclusion and limitation clauses sought to be relied as limiting or excluding liability for negligence<sup>807</sup> and vicarious liability for such<sup>808</sup> by parties acting in the course of a business.<sup>809</sup> (It has no role where liability is strict, although in cases of product liability, there are provisions in separate legislation, implementing the EC Directive, to prevent the exclusion of limitation of liability in that field)<sup>810</sup> The Act regulates not only contractual exclusions or limitations of delictual/tortious liability, but also such exclusions or limitations by way of a unilateral “notice” that determines in advance the basis of any relationship that may result in giving rise to delictual or tortious liability. This is of importance owing to the fact that the law of tortious/delictual negligence has a wide role in business under English and Scots law. Such “notices” include not only, for instance, notices by occupiers in the course of a business of land or other premises aimed at persons coming onto that property, but also, for instance, “notices” which are aimed at excluding or limiting liability for economic loss, where information is given in a context that is one where a duty of care is capable of arising in respect of negligent advice-giving. As the provisions for Scotland in the Act did not originally state clearly,<sup>811</sup> by contrast to those

<sup>803</sup> *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 per Lord Hoffmann at [57] – [62].

<sup>804</sup> *Ailsa Craig Fishing Ltd v Malvern Fishing Co Ltd* 1982 SC (HL) 14; [1983] 1 W.L.R. 964.

<sup>805</sup> E. g. *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 Q.B. 71 (Court of Appeal – England – “caused by fire”, did not cover negligently started fire; *North of Scotland Hydro-Electric Board v D & R Taylor* 1956 SC 1 (Scotland) “all claims ... arising from his operations under the contract” – did not cover claims based on negligence.

<sup>806</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 (House of Lords).

<sup>807</sup> *The Scottish provisions refer “breach of duty”, which is then given a definition (in section 25) as “breach ... (b) of any common law duty to take reasonable care or exercise reasonable skill”. The English provisions (section 2) use the word negligence.*

<sup>808</sup> It is not clear that this applies to vicarious liability for the intentional wrongdoing of an employee, but such a case would be likely to also give rise to breach of contract (as where the was a contract to provide the services of employees and the text would be applied to the clause as it affected that. (see para 340).

<sup>809</sup> Section 1(3) (England); Section 16 (Scotland).

<sup>810</sup> Consumer Protection Act 1977 Section 7.

for England, that the Act did regulate such “notices”, the Scottish provisions were amended<sup>812</sup> to bring them into line with the English provisions, once it became apparent that the courts in both jurisdictions were recognising various contexts capable of giving rise to a duty of care in respect of negligent advice causing pure economic loss, where there was no contract between the party suffering that loss and the party liable. The stimulus for this was the recognition by the courts of delictual/tortious liability for economic loss caused to a party by the negligence of a party acting under a contract with a third party. This stimulus, first in England,<sup>813</sup> then in Scotland,<sup>814</sup> came from findings that a building surveyor instructed to value a property as intended security under contract by a party proposing to lend money to a purchaser of it normally does have a duty of care in tort/delict to that purchaser if he negligently overvalues the property and the purchaser accordingly suffers an economic loss through his purchase. The court will determine in such cases without reference to the notice whether there was or was not a relationship capable of giving rise to a duty of care.<sup>815</sup> In cases of economic loss based on negligent advice-giving or other acts leading to primary economic loss, for instance negligent investment<sup>816</sup> that means it will determine first “assumption of responsibility” and so a duty of care in delict/tort, and then consider whether it is or is not validly excluded or limited.<sup>817</sup> In this way in effect the control of these exclusion and limitation clauses is not affected by the juristic classification of the basis of liability as in contract or in tort/delict. Provisions in a contract or “notice” excluding or limiting liability for personal injury or death are invalid in cases of liability of a party acting in the course of business.<sup>818</sup> Other provisions in a contract or “notice” excluding or limiting delictual liability of a party acting in the course of a business, if they are brought to the attention of the party when the relationship capable of giving rise to a duty of care for negligence is established, are valid if they are “fair and reasonable”.<sup>819</sup> The determination of what is fair and reasonable requires the court to balance the same sort of factors that it has to consider in respect of those exclusion and limitation clauses relating to breach of contract, that are subject to this same test as detailed below in paragraph 242.

## (b) Contract law

**233. Statutory and contractual limitations of contractual liability** In contract law also, statutory and contractual liability reduction clauses can be differentiated. Examples of

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<sup>811</sup> *Robbie v Graham & Sibbald* 1989 SLT 870.

<sup>812</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 68.

<sup>813</sup> *Smith v Eric S. Bush* [1990] 1 A.C. 831.

<sup>814</sup> *Melrose v Davidson and Robertson* 1993 SLT 611.

<sup>815</sup> *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659 (CA) – a case of negligent damage to property.

<sup>816</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145.

<sup>817</sup> *Smith v Eric S. Bush Ltd* (above) as interpreted in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145.

<sup>818</sup> Unfair Contract Terms Act 1977 sections 1 and 2 (1) (England); section 16 (1) (a) (Scotland).

<sup>819</sup> Section 1 and 2 (2) (England); Section 16 (1) (b) (Scotland).

the first are few and far between, however. One is found in art. 1103 of the Spanish CC in which the courts can reduce the liability for negligence in the circumstances of the individual case. Liability for intention does not come under this provision. Spanish case law, moreover, considers liability for gross negligence as mandatory law.<sup>820</sup> Swedish law also recognizes a reduction clause. This is due to the fact that the already mentioned § 2 of the sixth chapter of the Swedish Liability Act is also applicable for contractual liability. The motives refer to the example that the compensation duty of a tenant for damage to the land and buildings of the landlord can be reduced.<sup>821</sup> Further reduction clauses are found in § 70 (2) of the sales law, in § 34 of the consumer service law, in § 34 of the consumer sales law as well as in chap. 2 § 14 (1) and chap. 4 § 2 of the law on commercial companies and partnerships. An analogous application of this provision to other contracts is conceivable.<sup>822</sup>

234. PECL As a general principle for contractual liability exemption, art. 8:109 PECL suggests the following regulation: “Remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction”.

235. **France and Belgium** In the French contract legal system, contractual liability exemption clauses are in principle, permissible.<sup>823</sup> There are numerous important exceptions to this rule, however. Liability for a *faute intentionnelle* can not be excluded, whilst a *faute lourde* and a *faute intentionnelle* are, as a rule, treated equally.<sup>824</sup> Moreover, there are several specific statutory rules, following which, liability exclusion clauses are not permissible in certain types of contract. A particularly important example of such specific regulations, which aim at protecting particular categories of contractors, is found in art. 132-1 *Code de la consommation*.<sup>825</sup> In the Belgian contract legal system the same principle is valid. Here also, it encounters several exceptions. All clauses which violate necessary stipulated legal regulations against common decency or the *ordre public*, are not permissible.<sup>826</sup> Contractual liability exemption clauses are voidable if they would make the contractual obligations of a party pointless.<sup>827</sup> Furthermore, a few special competition law regulations are important. Art. 31 ff. of the *Loi sur les pratiques du commerce et sur l'information et la protection du consommateur* contains specific rules on voidability of the so-called unjust clauses in purchase and service contracts with consumers. Art. 7 ff. of the

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<sup>820</sup> T.S. 29th October 1983, RAJ 1983 (2) p. 3997, no. 5275.

<sup>821</sup> *Hellner and Johansson*, Skadeståndsrätt<sup>6</sup>, 435.

<sup>822</sup> *Hellner and Johansson* loc.cit. 435 with fn. 11.

<sup>823</sup> *Terré/Simler/Lequette*, Les obligations<sup>8</sup>, no. 612-613 p. 595-597.

<sup>824</sup> *Terré/Simler/Lequette*, loc.cit. no. 615 p. 598-599.

<sup>825</sup> An English translation of arts. 132-1 *Code de la consommation* is available online under [http://www.legifrance.gouv.fr/html/codes\\_traduits/consolegtextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/consolegtextA.htm)).

<sup>826</sup> See on this in particular B.H. Verb. (-Claessens) II-4, nos. 1800-1805.

<sup>827</sup> *Claessens* loc.cit. no. 1810.

Loi relative à la publicité trompeuse et à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales of the 2nd August 2002<sup>828</sup> contain comparable rules on voidability of unjust clauses in contracts between self-employed persons and their business customers.

**236. Spain** In Spain arts. 1255, 1104 (2) and 1105 CC are the starting point of any examination.<sup>829</sup> In accordance with art. 1255 CC the contracting parties can arrange agreements, clauses and conditions, which they hold as being appropriate, as long as they are not contrary to laws, morals or public order. Art. 1102 CC clarifies, moreover, that liability for intention can not be contracted away. From this it is concluded in the *argumentum e contrario*, that exemptions from liability in cases of simple negligence are, in principle, allowed.<sup>830</sup> Liability for gross negligence is, on the other hand, seen as immune from exemption, which is in accordance with the legal situation under art. 1103 CC.<sup>831</sup> Furthermore, it is necessary that the exemption of liability is objectively justified.<sup>832</sup> The rules of the consumer protection law (law 26/1984 of the 19th July 1984, *Ley General para la defensa de los consumidores y usuarios*),<sup>833</sup> are furthermore to be referred to. Following this, exemptions from liability in relation to consumers for death and injuries to body and health are void. The Spanish law on general terms of business (law 7/1998 of 13th April 1998, *Ley sobre condiciones generales de la contratación*),<sup>834</sup> contains a practically identical regulation to the one which was already prepared by the older Spanish case law.<sup>835</sup>

**237. Portugal** Portuguese law has a set position against exemptions from contractual liability. Following art. 809 of the Portuguese CC a clause is void if it means that the obligee goes without a claim for non-performance or delay.<sup>836</sup> Following art. 809 *in fine* in relation with art. 800 (2) the liability of the debtor for actions of his representatives or assistants can be limited or excluded through an agreement, in as far as this does not breach the *ordem pública*. Further exceptions from the basic rule are found in art. 602 CC (concerning guarantees) and in art. 810 CC (concerning agreements over the amount of compensation to be given).<sup>837</sup> According to the case law, exemptions from liability for

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<sup>828</sup> B.S. of 20th November 2002, p. 51704.

<sup>829</sup> *Lacruz Berdejo*, Elementos de Derecho Civil, vol. 2: Derecho de Obligaciones, part 1: Parte General. Teoría General del Contrato (1999) 174.

<sup>830</sup> *Díez-Picazo*, Fundamentos del Derecho Civil Patrimonial. Vol. 2: Las relaciones obligatorias<sup>4</sup> (1993) 617.

<sup>831</sup> T.S. 2nd July 1992, RAJ 1992 (4) p. 8492, no. 6502.

<sup>832</sup> *Díaz Alabart* in Comentarios al Código Civil y Compilaciones Forales (ed. by Albadalejo), vol. 15., part 1 (1989) 582.

<sup>833</sup> BOE 24th July 1984, nos. 175 and 176.

<sup>834</sup> BOE 14th April 1998, no. 89.

<sup>835</sup> T.S. 22nd October 1996, RAJ 1996 (4) p. 9784, no. 7238.

<sup>836</sup> See on this e.g. STJ 9 July 1991, BolMinJus 409 (1991) p. 759.

<sup>837</sup> Comparison on this in-depth STJ 27th April 1999 BolMinJus 486 (1999) p. 291.

simple negligence (*culpa leve*) should be allowed; such a *cláusula de irresponsabilidade* breaches neither art. 809 CC, nor the *ordem pública* in the sense of art. 800(2) CC.<sup>838</sup>

**238. Germany** In German law the limits of exemptions from contractual liability are in principle identical to those which have already been described for non-contractual liability. However, for contract law there are additionally numerous particular provisions and rules. It has been decided, for example, that a liability exemption clause between an employer and a third party, also protects an employee.<sup>839</sup> Furthermore the special regime of inn-keepers' liability in §§ 701-704 BGB is to be referred to, which dates from the corresponding Convention of the European Council,<sup>840</sup> furthermore §§ 444, 475, 619, 651, 651h, 651m, 676g (5) BGB and §§ 449, 451h, 466, 475h HGB.

**239. Austria** For Austrian law it has always been said that the total exclusion of contractual liability can be contrary to public policy.<sup>841</sup> Liability for the breach of general safeguarding duties protecting the body and health of the contracting partner is immune from exemption.<sup>842</sup> An effective exclusion of contractual liability, as a rule, also applies to tortious liability. In the framework of § 6 (1) no. 9 consumer protection law (KSchG), which concerns the limits of liability exemption and breach of contract, *culpa in contrahendo*<sup>843</sup> and tort are not differentiated.<sup>844</sup> § 6 para. 1 KSchG also serves as a yardstick in order to particularise gross detrimental treatment in contractual provisions included in standard terms and conditions beyond the field of consumer transactions.<sup>845</sup> § 970a ABGB regulates exemption of inn-keeper's liability. Following § 10 EKHG an agreement is void, in which the keeper of a vehicle wishes to exclude or reduce in advance, liability for the killing or injuring of passengers which have to pay for the transportation. In relation to other passengers § 10 EKHG does not intervene, though.<sup>846</sup> Whether this ban on liability exemption also extends to claims for fault, is disputed.<sup>847</sup> Liability exemption for intentional causing of harm is immoral and void. Liability exemption for property damage caused by minor negligence is permissible. It is disputed, whether liability exemption from gross negligence is contrary to public policy generally or only outside of individual contracts.<sup>848</sup> Incompatibility with public policy is assumed,

<sup>838</sup> STJ 19th March 2002, CJ(ST) X (2002-1) p. 135, 137.

<sup>839</sup> Palandt-*Putzo*, BGB<sup>62</sup>, § 611, no. 159.

<sup>840</sup> European Agreement of 17th December 1962 on the liability of public house landlords for objects brought in by their guests, BGBl. II 1966, 269 and 1967, 1210.

<sup>841</sup> *Gschütz*, Schuldrecht AT<sup>2</sup> 36; OGH 29th April 1970 SZ 43/84.

<sup>842</sup> OGH 23rd March 1993 SZ 66/40.

<sup>843</sup> *Krejci* in Rummel-ABGB II<sup>3</sup> (2002), § 6 KSchG no. 122.

<sup>844</sup> *Apathy* in Schwimann, ABGB VI<sup>2</sup> (1997), § 6 KSchG no. 33. Likewise *Krejci* in Rummel-ABGB II<sup>3</sup> (2002), § 6 KSchG nos. 116, 120f.

<sup>845</sup> *Krejci* in Rummel-ABGB I<sup>3</sup> (2000), § 879 no. 244.

<sup>846</sup> *Schauer* in Schwimann, ABGB VIII<sup>2</sup> (1997) § 10 EKHG no. 4.

<sup>847</sup> Further *Schauer*, loc.cit. no 9 and *Koziol*, Haftpflichtrecht I<sup>3</sup> (1997) 539.

<sup>848</sup> Further *Koziol* loc.cit. 540.

if the negligence was so crass that one can not reckon with behaviour of this type based on the experiences of daily life and following ordinary modes of conduct.<sup>849</sup>

**240. Italy and The Netherlands** According to Italian contract law, every agreement which in advance excludes or reduces the liability of the debtor in relation to intention or gross negligence, is void. Every exemption from liability agreed upon in advance, which breaches basic values of the legal system, is also void (art. 1229 CC). Under this point in particular, exemptions from liability for damage to body and health are void.<sup>850</sup> Liability exemption clauses require written acceptance, even if they are contained in general terms of business (art. 1341 (2) CC). For consumer contracts the extended regulations of the II Title of the II Book of the CC apply. In Dutch law also, an exemption from liability for gross fault (*grove schuld*) is void due to a breach of good morals (*goede zeden*) (art. 3:40 BW).

**241. United Kingdom** In both England and Scotland the validity of a provision excluding or limiting liability for breach of contract (except in so far as additionally or separately affected by legislation following on the EC Directives noted above in paragraph 223) is, as it is with liability in delict/tort, governed by the Unfair Contract Terms Act 1977. The Act includes controls on terms in certain business-to-business contracts. The separate statutory provisions in the Act for England<sup>851</sup> and for Scotland<sup>852</sup> do not generally result in different approaches in the two jurisdictions. Only in one respect, what is covered as general conditions of business have the differences turned out to be important, as detailed further below.<sup>853</sup> The Act also includes some control of provisions in consumer contracts. These have now to be read as additional to the legislation<sup>854</sup> implementing the EC Directive for such contracts, which is today the main control in that area. There is no control at common law of exclusion and limitation clauses, whether in business-to-business or in consumer contracts, in either jurisdiction. Although some of the categories of contracts or terms within them which are recognised as unenforceable as contrary to public policy, are ones where they are unreasonable as between the parties, these are narrow categories, such as the regulation of penalty clauses, and clauses in restraint of trade. So, the concept has no relevance to exclusion or limitation of liability for breach for contract as “no general doctrine [at common law] against unfair terms has ever developed”.<sup>855</sup> However, the rules, discussed above at para

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<sup>849</sup> OGH 22nd October 1968, SZ 41/139.

<sup>850</sup> *Pisu*, L'inadempimento delle obbligazioni, Trattato di diritto privato diretto da Rescigno, 9, Obbligazioni e contratti, Tomo primo (1992) 228-229.

<sup>851</sup> Unfair Contract Terms Act 1977 Part I.

<sup>852</sup> Unfair Contract Terms Act 1977 Part II.

<sup>853</sup> Unfair Contract Terms Act 1977 section 3 (England); section 17 (Scotland).

<sup>854</sup> Originally the Unfair Terms in Consumer Contracts Regulations 1994, currently the Unfair Terms in Consumer Contracts Regulations 1999.

<sup>855</sup> *Unfair Terms in Contracts Law Commission Consultation Paper 166/Scottish Law Commission Discussion Paper 119 (2002) 2.1.* As with the question of exclusion of liability for delict in Scotland, an earlier suggestion at one time in Scots law (*McKay v Scottish Airways* 1948 SC 248 per Lord President Cooper at 363) that there might be situations where an exemption clause in

230 in connection with delict/tort with regard to fraud and the approach to interpretation requiring particular clarity of negligence, are also applicable where the liability is based on breach of contract. The whole area, including the relationship between the Unfair Contract Terms Act 1977 and the legislation implementing the EC Directive regulating terms in consumer contracts, is currently being reviewed by the Law Commission and the Scottish Law Commission jointly with a view to legislative reform. Their preliminary proposals envisage a unified, single piece of legislation covering the whole area, with common provisions for both England and Scotland.<sup>856</sup> They also envisage significant reform of the substance of the control of unfair terms in business-to-business contracts, largely adopting for them similar principles as those adopted for consumer contracts in the EC Directive. In a business-to-business contracts an exclusion or limitation clause will be invalid if it is (a) contained in a contract that is one of the types of contract to which the Act is applicable and (b) either relates to an implied term as to quality in a contract of sale or supply of goods<sup>857</sup> or is part of (to use a phrase different from those in the Act) general conditions of business, and (c) is not “fair and reasonable”.<sup>858</sup> Terms permitting a party to “render no performance” or to perform the contract in a “substantially different way from that reasonably expected” are in this context treated in the same way as exclusion and limitation clauses.<sup>859</sup> It is not clear how far this extends. The only authority considered it potentially applicable to a clause permitting a contract to be terminated on an unreasonably short notice given the effects (of losing a telephone number) on the disadvantaged party.<sup>860</sup> The Act applies to most types of contract. But important amongst those types to which it does not apply are contracts of insurance, contracts relating to land, and contracts for the supply of goods from one country to another.<sup>861</sup> The current preliminary proposals of the Law Commissions envisage no change in this in the future, except possibly in respect of international supply contracts.<sup>862</sup> As noted above, the question of exactly what qualifies as being seen as general conditions ((b) above), and so bringing any exclusion and limitation clause in them, under the control of the Act, differs<sup>863</sup> between England<sup>864</sup> and Scotland.<sup>865</sup> For England what is required for the Act to apply is that one party to the contract “deals ... on ... written standard terms of business” of the party seeking to rely on

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a contract was so “extreme” as to be invalid either as “depriv[ing] the contract of all meaning” or “contrary to public policy” has not been followed.

<sup>856</sup> *Unfair Terms in Contracts* Law Commission Consultation Paper 166/Scottish Law Commission Discussion Paper 119 (2002).

<sup>857</sup> Section 6 (England); Section 21 (Scotland).

<sup>858</sup> Section 11 (England); Section 17 (1) (Scotland).

<sup>859</sup> Section 3(2)(b) (England); Section 17 (1)(b) Scotland.

<sup>860</sup> *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459, discussed in *E McKendrick, Contract Law, Text, Cases and Materials* (2003) 457-458.

<sup>861</sup> Unfair Contract Terms Act 1977 Schedule 1 (England); Schedule 2 (Scotland).

<sup>862</sup> Unfair Terms in Contracts 16.

<sup>863</sup> For an extended, up-to-date discussion of this difference from the English point of view see *E McKendrick, Contract Law, Text, Cases and Materials* (2003) 457-458.

<sup>864</sup> Section 3.

<sup>865</sup> Section 17.

the clause. This has been interpreted as requiring a frequency of use of the form by that party,<sup>866</sup> and not covering a form used in a whole sector of industry or commerce, such as those drawn up by trade associations, unless “either by practice or by express statement” it is “invariably or at least usually used by the party in question”.<sup>867</sup> A form can qualify, however, even though there has been negotiation as to its terms.<sup>868</sup> For Scotland a wider approach is taken, as what is required for the Act to apply is that the contract is “a standard form contract”<sup>869</sup> This has been interpreted<sup>870</sup> as covering not only written contracts, but also contracts which are partly oral, such as those where written conditions are incorporated by reference. It can cover terms such as those drawn up by trade associations. It definitely applies where terms of the types are “invariably” used in contracts of the type.<sup>871</sup> It probably covers terms that are more generally commonly used.<sup>872</sup> The current preliminary proposals of the Law Commissions, envisage a different approach for both jurisdiction, being adopted by legislation in the future, reflecting aspects of the approach in the EC Directive for consumers. This would distinguish between individually negotiated terms, which would not be controlled and those that are not individually negotiated, which would be.<sup>873</sup> The consideration of when an exclusion or limitation clause is “reasonable”, and so enforceable, and when it is not is one in which a balancing is carried out of a “whole range of considerations”.<sup>874</sup> It is recognised that there may be a reasonable difference of opinion between judges in carrying out this exercise.<sup>875</sup> Guidelines in the Act indicative of the main factors are relevant in carrying out this exercise for terms in sale of goods contracts<sup>876</sup> and are taken also as the starting point for business-to-business contracts more generally.<sup>877</sup> Particularly important among these are, the strength of bargaining positions of the parties relative to each other, in the light of any other means by which the disadvantaged party could have had his requirements satisfied. Also of particular importance is whether there was any inducement to agree to the terms, taking account of the relative availability of the disadvantaged party having the possibility of contracting with another supplier in the market. However, an exclusion clause has been held reasonable, in the light of the balance of other factors where the contract was with a party, a wholesale fish merchant that had effectively a monopoly position in that part of the country.<sup>878</sup> Further building on a rule in the common law of contract<sup>879</sup> which requires any particularly onerous term

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<sup>866</sup> *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Ltd* (1991) 56 Build LR 115.

<sup>867</sup> *British Fermentation Products Ltd v Comptoir Reavell Ltd* [1999] BLR 352.

<sup>868</sup> *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481.

<sup>869</sup> Section 17(1).

<sup>870</sup> *McCrone v Boots Farm Sales Ltd* 1981 SLT 103.

<sup>871</sup> *Ibid*; *Border Harvesters Ltd v Edwards Engineering (Perth) Ltd* 1985 SLT 128.

<sup>872</sup> *McBryde, The Law of Contract in Scotland*<sup>2</sup> 18-16.

<sup>873</sup> *Unfair Terms in Contracts* 16.

<sup>874</sup> *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyds Rep 273 (CA).

<sup>875</sup> *Ibid*.

<sup>876</sup> Schedule 2.

<sup>877</sup> *Stewart Gill Ltd v Horatio Myer and Co Ltd* [1992] Q.B. 600 at 608.

<sup>878</sup> *Denholm Fishselling Ltd v Anderson* 1991 SLT (Sh Ct) 24.

<sup>879</sup> *Interfoto Picture Library Ltd v Siletto Visual Programmes Ltd* [1988] 1 All ER 318.

to be clearly brought to the notice of the party before it can be seen as having been included at all in the contract, it is of importance, how far the disadvantaged party was aware of the existence and extent of the term. Other factors weighed have included, whether the contract had been offered with a genuine option to choose to pay more for the contract without the clause in question.<sup>880</sup> Where the clause is a limitation clause, the extent and ambit of the limitation is, naturally a relevant factor.<sup>881</sup> A limitation clause confining liability for breach of a contractual duty to insure goods in transit, for instance, was held not to pass the reasonableness test where it limited liability to a sum that was in the event around only one fourteenth of the loss sustained.<sup>882</sup> A relevant, and in practice likely to be decisive factor, where a clause excludes liability unless the disadvantaged party complies with a condition, such as intimating that goods are defective,<sup>883</sup> or setting a time limit for making claims,<sup>884</sup> is the extent to which it was practicable for the disadvantaged party to comply with that condition. Other relevant factors include, whether insurance was available against breach.<sup>885</sup> For consumer contracts the Unfair Contract Terms Act continues to have a certain importance in addition to the legislation implementing the EC Directive in that it gives certain protections that are specific, in particular making invalid excluding or limiting liability for breach of implied terms of quality in sale or other supply of goods contracts.<sup>886</sup> Also the definition of "consumer"<sup>887</sup> is rather wider than it is in the legislation implementing the EC Directive, and has been held applicable to protect a business when purchasing a motor vehicle to be used by one of its directors as his private car, as well as in connection with the company's business.

**242. The internal market** The rules that determine the validity of liability exclusion clauses differ markedly among the legal systems of the member states, whether it be the exclusion of contractual liability or the exclusion of non-contractual liability. In French law it is always impossible to exclude non-contractual liability. In Italian law it is not possible to exclude liability for breaches of duties which serve to protect the fundamental values of the legal system. In Austria it is possible by way of contractual agreement to exclude liability for negligently caused property damage (and also in certain defined cases where such damage is caused by gross negligence). On the other hand, no exclusion of liability is possible in cases of personal injury or death. This latter rule is found also in Portuguese law. In Portugal, however, in the general case (that is where standard terms of business are used) exclusion of tortious liability is invalid. Exclusions of contractual liability are only possible for failure to perform or for defective or late performance. The starting point in German law is that exclusions of tortious liability are generally permissible. This principle is in turn limited in all sorts of ways. In standard form

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<sup>880</sup> Cf *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659.

<sup>881</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 Ac 803.

<sup>882</sup> *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyds Rep 273 (CA).

<sup>883</sup> *Knight Machinery (Holdings) Ltd v Rennie* 1995 SLT 166.

<sup>884</sup> *Granville Oils and Chemicals Ltd v Davies Turner & Co Lts.* 2002 WL 313976696.

<sup>885</sup> *The Falamar Price* [1990] 1 Lloyd's Rep 434 at 439.

<sup>886</sup> Section 6(2) England; Section 21 (a) (i) (Scotland).

<sup>887</sup> Section 12 (England); Section 25 (Scotland).

contracts under German law only liability for negligently caused property damage may be excluded. Manifestly more far-reaching possibilities for excluding liability are permitted in English law, and so on.

Numerous problems for the internal market arise from this highly complex array of different legal standards. Businesses that wish to rely on exclusion clauses in another European country, or businesses that are confronted with these, necessarily have to fear that they will incur a substantial cost in ascertaining what the legal position is. In fact, as regards many particular questions this is often not at all ascertainable with anything like certainty, because with general clauses it may be that their practical effect can only be determined after there has been comprehensive analysis and interpretation of case law. This in turn provides plenty of scope for legal disputes. A party that succeeds in imposing its standard terms of business on a party from another country is faced with the difficulty that, should the occasion arise, those terms must satisfy the requirements of the law in that country, in particular its law of tort. Otherwise it may have to reckon with “unpleasant surprises”. Exporters who are well informed may be forced to adapt their calculation of the price to reflect the circumstance that the exclusion of non-contractual liability is not possible in the country to which the goods or services are to be exported. It is indisputable that the differences in the law relating to the exclusion of liability entail that the conditions under which goods and services are traded in Europe vary from country to country and from one provider to another.

In the responses to our questionnaires it emerges that this problem of the validity or invalidity of liability exclusion clauses is appreciated. However, those responding only indicated that attempts were made to meet those difficulties by the choice of one’s own law. One business association informed us that member businesses’ exclusions of liability to customers would only be enforceable in respect of lost output and lost profit. In this branch of business limitations of liability in standard terms and conditions are secured by agreeing on Swiss law. However, response from the insurance industry indicated that in that field of business the validity of liability exclusion or restriction clauses is of the utmost importance. The possibility of assessing the risk depends on it. It is precisely this problem which compels liability insurers to undertake elaborate research into foreign legal systems.

### (9.) Contributory Negligence (or Fault)

243. **Germany and Portugal** Differences between contractual and non-contractual liability can be found in the law of the reduction of liability as a consequence of contributory negligence. This is due to the fact that only legal systems which (for example Germany) work with the category of general liability law are in the habit of setting up a standardized contributory negligence regulation for contract as well as tort law (compare § 254 BGB). A purely tort law norm is found in the form of § 846 BGB, though, which provides for a reduction of the compensation claim of a relative in the case of contributory negligence by a person who died (negligence suffices). Arts. 570-572

of the Portuguese CC also concern as much tortious as contractual liability. Art. 570 (1) CC provides the basic rule, whereby if the fault (*facto culposo*) of the injured party has contributed to the existence or increase of damage, it is for the court to determine on the basis of the degree of fault of both parties and the consequences resulting from it, whether the compensation should be awarded in its entirety, reduced, or excluded. Contributory negligence of an injured party leads to a *repartição da responsabilidade*.<sup>888</sup> Art. 570 (2) CC provides the special rule that contributory negligence on the part of the injured party, according to the rule, completely excludes the liability of the defendant, if it is merely “based on a bare presumption of fault.”<sup>889</sup> In accordance with art. 571 CC the fault of the injured party, that of his legal representative and that of persons who are instructed by him, are treated equally. Art. 572 CC clarifies that the court has to officially consider contributory negligence of the injured party.

### (a) Tort law

**244. France and Belgium** In the French tort law system the *faute de la victime*, as a rule, leads to a *partage de responsabilité* and therefore to contributory negligence of the victim. This (uncodified) rule is as much applicable to tortious liability for one’s own inappropriate conduct as to tortious liability *du fait des choses*. It only comes to a “sharing of the responsibility” if the action of the victim was *fautif* and had a causal connection to the damage.<sup>890</sup> If the inappropriate conduct of the victim was the sole cause of the damage and, moreover, was for the defendant *insurmontable* and *imprévisible*, then the defendant has no liability whatsoever. The same is true if the *faute* of the victim was intentional and the defendant did not make a *faute par imprudence*.<sup>891</sup> In the Belgian tort law system also, the *faute* of the victim which contributes to the existence of damage, leads to a sharing of the liability between the victim and the tortfeasor, so that the victim can not receive complete compensation from the tortfeasor. This rule is not only applicable in cases of tortious liability for one’s own inappropriate conduct, but rather likewise for the existence of strict liability.<sup>892</sup>

**245. Italy** The (contract law) provision of art. 1227 of the Italian CC is also applied in tort law in accordance with art. 2056 CC.<sup>893</sup> Compensation is reduced in accordance

<sup>888</sup> Further e.g. STJ 10th March 1998, BolMinJus 475 (1998) 635 (contributory negligence of a designer for the lack of provision of electricity in the studio; reduction of the liability of the landlord) and STJ 15th December 1998 CJ(ST) VI (1998-3) 152 (contributory negligence of a railway passenger who died in an accident. He boarded an over-full train and remained standing by an unclosed door).

<sup>889</sup> For the law of strict liability from transport accidents, special rules are found in arts. 505 and 506 CC.

<sup>890</sup> *Malaurie and Aynès*, Responsabilité délictuelle<sup>11</sup>, no. 128 p. 72-73.

<sup>891</sup> *Malaurie and Aynès* loc.cit. no. 130 p. 73-74.

<sup>892</sup> *Vandenberghé/Van Quickenborne/Wynant*, Aansprakelijkheid uit onrechtmatige daad (1985-1993), TPR 1995, no. 173 p. 1481-1482.

<sup>893</sup> Cass. 28th March 1997, n. 2763, Giust. civ. Mass. 1997, 485.

with the gravity of the fault and with the scope of the consequences resulting from it, if culpable conduct on the part of the obligee has contributed to the causing of the damage (art. 1227 [1] CC).<sup>894</sup> No compensation is owed for damage which the obligee could have avoided by using normal, everyday care (art. 1227 CC).

**246. Spain** As in the Code Napoléon, there is also a lack of a provision to regulate the problem of contributory negligence in the Spanish CC. The case law and academia accept, however, the basic concept of shared responsibility of the injured party.<sup>895</sup> They base it on the already mentioned art. 1103 CC (the contractual reduction clause).<sup>896</sup> Aside from this art. 114 CP (which expressly permits the defence of contributory fault if the liability is based on a criminal offence) is also applied analogously.<sup>897</sup> The courts reduce the liability of a tortfeasor if a *culpa* of the victim has contributed to the causing of the damage.<sup>898</sup> If the conduct of the victim is the sole cause of the damage, then all liability is ruled out.<sup>899</sup> In the framework of the test for contributory negligence the responsible capacity of the victim notably plays no role;<sup>900</sup> consequently a child's claim may be ousted by the defence of contributory fault.<sup>901</sup>

**247. Austria** In Austria also, it is the case that the injured party, if he has contributed to the causing of the damage through his fault, carries the burden of the damage with the tortfeasor in accordance with the proportion of fault. If the proportion is not determined, the responsibility for damage is shared equally (§ 1304 ABGB). Correspondingly § 1304 ABGB is also to be applied outside the area of liability with fault.<sup>902</sup> It is disputed whether the injured party, in the case of tortious damage in the framework of § 1304 ABGB, must have every fault of an assistant taken into account (similar to § 1313a ABGB), or whether this should only be the case under the reduced requirements of § 1315 ABGB. According to the case law<sup>903</sup> and one thread of academic analysis,<sup>904</sup> in the framework of § 1304 ABGB one has to be responsible for all persons as assistants or 'custodians'<sup>905</sup> who at the time of the damage, with the consent of the injured party, at least partially exercised control over the injured party's object of legal protection, or those who the injured party used to look after his contractual obligee duties. In accordance with this, a

<sup>894</sup> *Alpa/Bessone/Zeno Zencovich*, I fatti illeciti, Trattato di diritto privato diretto da Rescigno, 14, Obbligazioni e contratti, Tomo sesto (1999) 59-60.

<sup>895</sup> *Lacruz Berdejo*, Elementos de Derecho Civil, vol. 2: Derecho de Obligaciones, part 2: Contratos y cuasicontratos. Delito y Cuasidelito. (1999) 500; T.S. 13th February 1993, RAJ 1993 (1) p. 978, no. 768.

<sup>896</sup> T.S. 15th December 1999, RAJ 1999 (5), p. 14492, no. 9200.

<sup>897</sup> *Luis Díez-Picazo*, Derecho de daños (Madrid 1999), p. 367.

<sup>898</sup> T.S. 17th May 1994, RAJ 1994 (2) p. 4877, no. 3588.

<sup>899</sup> T.S. 31st October 1998, RAJ 1998 (4) p. 11960, no. 8164.

<sup>900</sup> T.S. 5th November 1997, RAJ 1997 (5) p. 12544, no. 7884.

<sup>901</sup> T.S. 1st February 1989, RAJ 1989 (1) p. 703, no. 650.

<sup>902</sup> *Harrer* in Schwimann, ABGB VII<sup>2</sup> (1997), § 1304 no. 3.

<sup>903</sup> OGH 10th October 1991, SZ 64/140.

<sup>904</sup> In detail on the point of view *Koziol*, Haftpflichtrecht I<sup>3</sup> (1997) no. 12/66 ff., p. 402 ff.

<sup>905</sup> See *Koziol* loc.cit. no. 12/70, p. 405.

person who has handed over goods to a carrier, must be responsible for the contributory negligence of the carrier in relation to an injured third party.<sup>906</sup>

**248. The Netherlands** Art. 6:101 of the Dutch BW also subjects a claim which is reduced due to contributory negligence to a general equity test, and clarifies at the same time that it is not only cases, in which fault on the part of the injured party contributed to the causing of the damage, which are subject to the test. It can come to a reduced claim where, if the injured party was in the role of the defendant, he would be responsible for the damage as a result of strict liability.<sup>907</sup> Art. 6:101 (2) BW gives the judge broad discretion. The judge can reduce the claim, turn it down completely or leave it in full. A famous example for the latter of the alternatives is that of the case law developed rule, in which pedestrians and children under 14 years who are victims of a traffic accident, are always 100% compensated, unless they acted deliberately.<sup>908</sup> The driver cannot even assert *overmacht*.<sup>909</sup> It is furthermore taken into consideration, whether insurance protection existed for the realized risk, or whether it *should* have existed for this purpose.<sup>910</sup>

**249. Sweden** Swedish law accommodates the concept of contributory negligence only in the framework of tort law; in contract law, by contrast, the accent is on the duty to mitigate loss.<sup>911</sup> In tort law, because of the lack of special provisions<sup>912</sup>, compensation involving contributory negligence, following chap. 6 § 1 Liability Act, can be reduced. Chap. 6 § 1 (1) loc.cit. concerns damage to persons and limits the possibility of the reduction of a claim to cases of deliberate or grossly negligent contributory negligence. In the case of killings, relatives only take on the responsibility of the deliberate fault of the person who died.<sup>913</sup> Chap. 6 § 1 (2) Liability Act regulates the reduction of compensation for property damage and pure economic loss. Here normal negligence suffices.

**250. United Kingdom** The law of contributory negligence as it applies to delict/tort is essentially the same in both England and Scotland, as a result of having been introduced by a statute for the United Kingdom.<sup>914</sup> After long-standing doubt, it has now been held by the House of Lords<sup>915</sup> that it<sup>916</sup> is not potentially applicable to the whole range of tort law and specifically not the tort of deceit, including within that fraudulent misrepresen-

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<sup>906</sup> OGH 10th October 1991 SZ 64/140, further case law in RIS-Justiz RS0026815.

<sup>907</sup> MvA II, Parlementaire Geschiedenis 6, p. 352.

<sup>908</sup> H.R. 1st June 1990, NJ 1991, 720.

<sup>909</sup> H.R. 31st May 1991, NJ 1991, 721.

<sup>910</sup> Kortmann, AA 1987, p. 641-642.

<sup>911</sup> Both are not far apart from one another, however: *Hellner*, Speciell avtalsrätt Vol.2: Kontraktsrätt, Part 2: Allmänna ämnen<sup>3</sup> (1996) 250.

<sup>912</sup> Put together by *Hellner and Johansson*, Skadeståndsrätt<sup>6</sup> (2000) 236 ff.

<sup>913</sup> *Hellner and Johansson* loc.cit. 226.

<sup>914</sup> Law Reform (Contributory Negligence) Act 1945.

<sup>915</sup> *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] UKHL 22.

<sup>916</sup> Section 4.

tation,<sup>917</sup> nor to any of the torts, where the defence in its earlier common law form (as a complete defence) was inapplicable at common law. Accordingly, it seems that it cannot apply to any torts involving intention,<sup>918</sup> despite some contrary authority.<sup>919</sup> The question has not been considered in Scotland but it is clear that it is excluded from cases of intentional delict. Contributory negligence is potentially applicable to cases of breach of statutory duty,<sup>920</sup> and specific references to statutory strict liability regimes are there for the avoidance of doubt.<sup>921</sup> Its main field of application is, however, in cases of negligence. This includes cases of professional negligence. It has been applied in such cases not only where physical damage to property has resulted, for instance, cases where an architect negligent failed to include features to prevent the spread of fire in a building,<sup>922</sup> or a project manager was negligent in failing to recommend appropriate non-inflammable material,<sup>923</sup> and the client was negligent in starting the fire in question, but also in such cases where the negligence of the professional caused economic not physical loss, as for instance where it resulted in the plaintiff lending on the security of a building that was insufficient to cover the loan, in circumstance where the plaintiff was contributorily negligent in not checking appropriately the solvency of the creditor to whom it loaned the money.<sup>924</sup> In the light of recent persuasive Canadian<sup>925</sup> authority it probably potentially applies also to cases of misrepresentation causing pure economic loss, where the defendant is not a professional.<sup>926</sup> Recent Canadian authority is persuasive that it does potentially apply. The problem that had been perceived as potentially making it inapplicable to this kind of case is that one of the requirements for a duty of care to be capable of arising in respect of an economic loss caused by negligent misrepresentation is that there must be “reasonable reliance” on the part of the claimant. The question, therefore, arose as to how there could be a reasonable reliance and at the same time a failure to take reasonable care of his own affairs on the part of the claimant. That argument was rejected by the court, which distinguished the matters to which reasonableness relates in establishing the duty of care and in ascertaining whether there is contributory negligence: “With respect to the analysis on negligent misrepresentation, the focus is on the reasonableness of the reliance (and, of course, its foreseeability from the perspective of the

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<sup>917</sup> Lord Hoffmann at [18].

<sup>918</sup> *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] UKHL 22 per Lord Rodger of Earlsferry at [45].

<sup>919</sup> *Murphy v Culhane* [1977] Q.B. 94 per Lord Denning MR.

<sup>920</sup> It has always been accepted that it applies to those personal injury and death cases where an employer is liable for breach of statutory norms under industrial safety legislation, capable of giving rise to civil liability if breached. See *Reeves v Commissioner of Police of the Metropolis* [2000] 1 A.C. 360.

<sup>921</sup> Consumer Protection Act 1987 section 6(3).

<sup>922</sup> *Sahib Foods Ltd v Paskin Kyriakides Sands* [2003] EWHC 142 (TCC).

<sup>923</sup> *Pride Valley Foods v. Hall & Partners Contract Management Ltd (No 1)* [2001] EWCA Civ 1011 (2001) 76 Const LR 1.

<sup>924</sup> *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190 (HL).

<sup>925</sup> Ontario Court of Appeal.

<sup>926</sup> *Avco Financial Services Realty v Norman* 13<sup>th</sup> February 2003, <http://www.ontariocourts.on.ca/decisions/2003/april/avcoC36836.htm>

representor). In this respect, the circumstances surrounding the misrepresentation in question are of paramount importance. On the question of contributory negligence, the focus is on the event that occasioned the loss. The injured party's conduct, in all the circumstances surrounding that event, must be considered in order to determine whether it acted reasonably in its own interest or whether it contributed to the loss by its own fault. The circumstances surrounding the event that occasioned the loss, depending on the particular facts of the case, may be much wider in scope than the circumstances surrounding the negligent misrepresentation.<sup>927</sup> Where contributory negligence is applicable the decision as to its proportion, at least in routine personal injury and death cases is typically a matter of impression. The majority of findings of contributory negligence produce percentages of less than 30%. It appears, though, at least in England that in an appropriate case there could be a reduction of 100%.<sup>928</sup> Most cases lack any articulated discussion of the conceptual basis for determining whether there was contributory negligence and how the proportion is to be assessed. However, a recent professional negligence case has articulated the approach for all types of case as being correctly one that focuses on three questions: The first is whether the claimant was materially at fault. The second, if he was, is whether his fault lay within the very risk which it was the defendant's duty to guard him against. It is only if his fault was not, or not wholly, within the causative reach of the defendant's own neglect that the question of relative culpability "enters into the picture."<sup>929</sup> This structured approach must be seen, however, as itself reflecting the fact that questions of policy in the sense of the right attribution of responsibility underlie all questions of determining the proportion of contributory negligence.<sup>930</sup> The Court must balance conflicting goals to reflect that. So, for instance in a case where there was a duty giving rise to liability in the context on the part of the police for failing to take reasonable steps to prevent a suicide the proportion was assessed at 50% though the final causal event was obviously that of the victim. On the other hand, also reflecting the same approach but where responsibility was because of the context reflected through a consideration of causation, in a case where two workmen negligently failed to make a workplace safe, a higher proportion of contributory negligence was attributed to the victim who in fact then worked there and was killed by the unsafety then materialising.<sup>931</sup> Reflecting the policy of parliament in legislating to encourage

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<sup>927</sup> per Charron JA at [30]-32.

<sup>928</sup> In England in one personal injury case based not on negligence but on breach by of statutory safety law the claim was reduced to nil on a finding of 100% contributory negligence (*Jayes v IMI Kynal Ltd* [1985] ICR 155).

<sup>929</sup> *Pride Valley Foods v. Hall & Partners Contract Management Ltd (No 1)* [2001] EWCA Civ 1011 (2001) 76 Const LR 1 per Sedley L.J. at [69] By contrast in deciding a question of apportionment of liability between two defendants *inter se* (which does not affect the plaintiff) "Contribution starts from a point at which two or more defendants have been held to have contributed by their own fault to the claimant's injury. The remaining task is then to measure their contributions by gauging the relative causative potency of their respective faults and their comparative blameworthiness."

<sup>930</sup> *Reeves v Commissioner of Police of the Metropolis* [2000] 1 A.C. 360 per Lord Hoffmann.

<sup>931</sup> *Stapley v Gypsum Mines Ltd* [1953] A.C. 663.

safety precautions by employers a lower percentage of contributory negligence will be found where a particular statutory safety provision imposes strict liability.<sup>932</sup>

(b) Contract law

**251. France and Belgium** In the French contract legal system also, it is assumed that the existence of a *faute* on the part of the contractual debtor and a *faute* on the part of the contractual obligee, both of which have a causal connection with the contractual breach, leads to a proportional division of the liability.<sup>933</sup> Some legal text authors point out that a reduction of a claim in the framework of contract law can only come into consideration if the conduct of the contractual obligee represents *une faute relativement grave*.<sup>934</sup> In the Belgian contract legal system the principle is applied, that if the obligee has made an error, with the consequence that the contractual damage was not only caused by the debtor, the liability for the damage concerned is divided between the two contracting parties.<sup>935</sup>

**252. Italy** Italian contract law regulates questions of the contributory negligence of an obligee in art. 1227 CC. If culpable conduct on the part of the obligee has contributed to the causing of the damage, the compensation is reduced in accordance with the gravity of the fault and the extent of the consequences produced by it (art. 1227 (1) CC). The provision requires that the conduct of the injured party has contributed to the causing of the damage. Art. 1227 CC also applies to the disadvantage of those with a lower mental capacity.<sup>936</sup> No compensation is owed whatsoever for damage which the obligee could have avoided by using normal, everyday care (art. 1227 (2) CC). A rich case law has in the mean time cleared up most of the problems with details, which this provision brought up.<sup>937</sup>

**253. Spain** In Spain also, the academia and case law agree that the liability of a debtor can be reduced if the obligee's fault has also contributed to the non-performance or unsatisfactory performance.<sup>938</sup> What is left to question is only whether, with the con-

<sup>932</sup> *Staveley Iron & Chemical Co. Ltd. v. Jones* [1956] A.C. 627 per Lord Tucker 648 at 648.

<sup>933</sup> *Flour/Aubert/Flour/Savaux*, Le rapport d'obligation, no. 214 p. 138.

<sup>934</sup> *Malaurie and Aynès*, Contrats et quasi-contrats<sup>11</sup>, no. 571 p. 344.

<sup>935</sup> *Cornelis*, Algemene theorie van de verbintenis, no. 460 p. 579.

<sup>936</sup> Cass. 5th May 1994, n. 4332, Giust. civ. Mass. 1994, 610; Cass. 24th February 1983, n. 1442, Giust. civ. Mass. 1983, fasc. 2; Cass.sez.un. 12th February 1964, n. 351, Foro it. 1964, I, 752; see also Corte Cost. ord. 23rd January 1985, n. 14, Foro it. 1985, I, 934.

<sup>937</sup> Cass. 24th January 2002, n. 842, Giust. civ. Mass. 2002, 124; Cass. 10th May 2001, n. 6502, Giust. civ. Mass. 2001, 952; Cass. 14th June 1994, n. 5766, Giust. civ. Mass. 1994, fasc. 6.

<sup>938</sup> *Cavanillas Múgica and Tapia Fernández*, La concurrencia de responsabilidad contractual y extracontractual. Tratamiento sustantivo y procesal (1992) 39; *Díaz Alabart* in *Comentarios al Código Civil y Compilaciones Forales* (edited by Albadalejo), vol. 15, part 1 (1989) 517; *Díez-Picazo*, *Fundamentos del Derecho Civil Patrimonial*. vol. II: Las relaciones obligatorias<sup>4</sup> (1993) 599; T.S. 30th December 1994, RAJ 1994, no. 10244; T.S. 26th May 1988, RAJ 1988 (3) p. 4256, no. 4338.

tinuous case law of the *Tribunal Supremo*<sup>939</sup> this result can or must be dogmatically really convincingly based on the reduction clause of art. 1103 CC, or whether it can also be based on simple causation considerations.<sup>940</sup>

**254. Austria** In Austrian law the problem of contributory negligence, as has already been shown in the context of tort law, is the subject of § 1304 ABGB. An exception to this is found in § 878 sentence 3 ABGB, in which if at the concluding of the contract both sides knew of the impossibility of performing the duties, or had to know, nobody who has suffered damage as a result of the nullity of the contract has a claim for compensation.<sup>941</sup> If one contracting partner is damaged by the other partner, in the framework of a liability relationship, the injured party has to take on the responsibility of contributory negligence in the sense of § 1304 ABGB, if his assistant in performance contributed to the causing of damage through lack of care in relation to the goods of the company owner.<sup>942</sup> The same applies for a legal representative of the injured party.<sup>943</sup> Questions of whether the breach of a duty to warn, made by a worker following § 1168a ABGB offsets contributory negligence of the employer, and whether the employer takes on responsibility for contributory negligence of assistants in its sphere, are intensively discussed.<sup>944</sup> The breach of a duty to warn causes the employee to carry the burden of the danger for the successful outcome of the work, and at the same time leaves him exposed to a compensation claim. The case law in respect of this has recently approved an analogous application of § 1304 ABGB.<sup>945</sup>

**255. Sweden** The duty to mitigate loss in Swedish contract law, mentioned above, is codified in, amongst other places, § 70 (1) of the sales law: "The injured party shall take reasonable measures in order to limit their damage. If they fail to do this, they must bear a corresponding part of the loss." This obligation also applies for other contractual relationships.<sup>946</sup> § 16 of the law on the ban on discrimination against disabled people at work allows a part or whole reduction of compensation "if it is appropriate". The same applies in accordance with § 15 of the law on the ban of discrimination against persons on the basis of their sexual orientation, in accordance with § 7 (2) of the law on the ban of discrimination against part-time employees and employees with time-restricted employment, in accordance with § 20 of the law on measures against ethnic discrimination at work, and in accordance with § 28 of the equality law.

<sup>939</sup> T.S. 30th December 1994, RAJ 1994 (5) p. 13103, no. 10244.

<sup>940</sup> *Díaz Alabart* loc.cit. 517.

<sup>941</sup> On this so-called culpa compensation see *Koziol and Welser*, *Bürgerliches Recht* I<sup>11</sup> (2000) 153. On further contract law deviations from § 1304 ABGB see the overview by *Mayrhofer*, *Schuldrecht* AT (1986) 305 ff.

<sup>942</sup> OGH 21st March 1985, JBl 1985, 748; RIS-Justiz RS0026766.

<sup>943</sup> OGH 14th July 1992, SZ 65/108.

<sup>944</sup> *Iro*, *Die Warnpflicht des Werkunternehmers*, *ÖJZ* 1983, p. 505-514, 539-543 (541); *Koziol*, *Haftpflichtrecht* I<sup>3</sup> (1997), no. 12/23, p. 378; *Koziol and Welser*, *Bürgerliches Recht* II<sup>12</sup> (2001) 248.

<sup>945</sup> OGH 29th October 1992, JBl 1993, 521, note *Iro*.

<sup>946</sup> *Hellner*, *Speciell avtalsrätt* Vol. 2: *Kontraktsträtt*. Part 2: *Allmänna ämnen*<sup>3</sup> (1996) 250.

256. **United Kingdom** There has emerged a difference of opinion within the common law jurisdictions of England, Scotland and the British Commonwealth as to the way, if any, in which contributory negligence is a concept that is applicable to cases of breach of contract. The starting point is that contributory negligence, as the concept is understood today, as one that reduces by a percentage proportion the extent of liability of a defendant is a statutory innovation in the law. Accordingly, the Courts have approached the question as one of statutory interpretation of the relevant legislation, although it is clear that general principles relating to the nature of contract law and the law of tort/delict have played a role in this. For both England and Scotland the potentially applicable legislation (as with tort/delict) is the Law Reform (Contributory Negligence) Act 1945. Similar legislation exists in other jurisdictions of the British Commonwealth. In Australia, where a different approach to its applicability to breach of contract cases has been taken it is in an identical form to this Act.<sup>947</sup> The position in England as adopted by the Court of Appeal in a case in the late 1980s<sup>948</sup> distinguishes three classes of case. It held that only in one of these, namely where the liability in tort would arise anyhow independently of the contract, is contributory negligence applicable. At the other end of the spectrum was where the breach of contract did not involve any failure of care. In that category contributory negligence is not applicable. The third category was conceived of as lying between these two, but in it as well contributory negligence is not applicable. This is the situation where an express term of a contract lays down an obligation to take care, but one that would not arise independently of the contract under the law of tort. Applying this analysis in a later case,<sup>949</sup> it held that where defendants in breach of a building contract clause<sup>950</sup> had adversely affected a building by using a method of spraying an asbestos roof to clean it was not open to them to plead that the defendant's through their architects, who had supervised the work, were contributorily negligent.<sup>951</sup> In essence the approach is to allow contributory negligence to be pled only where it is artificial to distinguish the claim based on breach of contract from the claim based on a breach of duty of care in the tort of negligence. Expressly rejecting the English approach, the Australian High Court,<sup>952</sup> has held, at least where the contract is one for professional services,<sup>953</sup> that there is no role at all for contributory negligence. This approach, while again being based on an interpretation of the relevant legislation, is linked to a particular

<sup>947</sup> Wrongs Act 1936 section 27A.

<sup>948</sup> *Forsikring-saktieselskapet Vesta v Butcher (No 1)* [1989] AC 852 per O'Connor L.J. (in the Court of Appeal) at 8865-6 adopting the classification of the first instance judge, Hobhouse J. (the question did not need to be considered by the House of Lords).

<sup>949</sup> *Barclays Bank plc v Fairclough Building Ltd* [1995] Q.B. 214.

<sup>950</sup> Which required that "Materials and workmanship shall be the best of their respective kinds and the work shall be executed and finished in an expeditious efficient and workmanlike manner".

<sup>951</sup> For another example, see *Raflatac Ltd v. Eade* [1999] 1 Lloyd's Rep 506.

<sup>952</sup> *Astley v Austrust Ltd* (1999) 161 ALR 155.

<sup>953</sup> It clearly is not excluded for instance in the normal negligence case by an injured employee against his or her employer, where additionally to the breach of duty of care in negligence there is always a breach of an implied contractual term to take reasonable care for the safety of the employee.

perception of the relation between contract law and tort law. This is that in these types of contracts parties by contracting must be seen as having brought the whole of their relationship under contract law and so as a matter of policy contributory negligence designed fundamentally for tort law should have no application. Specifically, the view is based on three distinctions that the court emphasised<sup>954</sup> as distinguishing contract from tort. These were, in the view of the court: (1) contractual obligations are voluntarily assumed (2) contracts allocate risks between parties, typically not apportioning risk and reflecting that in particular in commercial contracts parties prefer the certainty of fixed rules to the vagueness of concepts such as 'just and equitable', and (3) the fact that money is paid for contractual rights supports this analysis. As there is no direct consideration of the question by the House of Lords (i. e. final appellate court in the United Kingdom) it is not unlikely that the approach of the Court of Appeal will when an opportunity arises be reconsidered. However, it does not follow that the approach of the Australian High Court will be followed. It is out of line, for instance with the approach taken in Canada.<sup>955</sup> In New Zealand the position is that contributory negligence is applicable in any case where negligence is the essence of the claim.<sup>956</sup> It has been criticised in academic literature in Australia,<sup>957</sup> where it has been suggested that the main problem is to ensure that the negligent defendant does not gain the advantage of apportionment over the defendant who breaches a strict obligation without negligence. And it has been suggested that a test of what is just and equitable should be adopted.<sup>958</sup> The Law Commission for England and Wales has, for instance, suggested that contributory negligence should be applicable where there is an implied obligation to take care in a contract.<sup>959</sup> The view has been put forward by the Scottish Law Commission before the decision of the Court of Appeal that only clear contractual provisions chan-

<sup>954</sup> See G Davis and J Knowler, 'Astley v Antitrust Ltd – Down but Not Out: Contributory Negligence, Contract, Statute and Common Law' (1999) 23 Melbourne University Law Review 668.

<sup>955</sup> (Ontario) *Tompkins Hardware Ltd v North Western Flying Services Ltd* (1982) 22 CCLT 1, 14-17; 139 D.L.R. (3rd) 329, 339-41; *Ribic v Weinstein* (1983) 140 D.L.R. (3rd) 258, 272-3 (Ont HCJ), aff'd without discussion of this point: *Weinstein v A E LePage (Ontario) Ltd* (1984) 47 OR (2d) 126; 10 D.L.R. (4th) 717.

<sup>956</sup> *Rowe v Turner Hopkins & Partners* [1982] 1 NZLR 178.

<sup>957</sup> G Davis and J Knowler, 'Astly v Antitrust Ltd – Down but Not Out : Contributory Negligence, Contract, Statute and Common Law' (1999) 23 Melbourne University Law Review 668.

<sup>958</sup> That phrase is found in the relevant legislation.

<sup>959</sup> *Report on Contributory Negligence as a Defence in Contract* (Law Comm. No 219 (1993) 4. 7-4. 15. no 219, at paras 3.40 et seq, and the Scottish Law Commission report no 115 (1988), Civil Liability – Contribution, at paras 4. 18 et seq). If the parties have inserted some general provision in the contract which can be "interpreted" to cover the situation the position is less clear. The Scottish Law Commission, on balance, came out in favour of allowing a plea of contributory negligence in these cases (see paras 4. 16 and 4. 17 and cl 9(1) of draft Bill). If the parties have not regulated their relationship at all and the law is doing this for them by means of an implied term, it is very difficult to understand why that implied term should exclude the possibility of the liability of one party being reduced by the contributory fault of the other (see Law Commission report no 219, at paras 4. 7-4. 15).

ging the obligation of care from that which would arise under the law of delict anyway should be unaffected by contributory negligence.<sup>960</sup> There is no appellate level decision considering the matter for Scots law. One first instance decision, dealing with “professional negligence” simply does not exclude the possibility.<sup>961</sup> In another first instance decision<sup>962</sup> the question did not arise because the alleged contributory negligence was in respect of a matter that was causally separate from the respect in which the defenders were in breach of contract. The breach of contract was the supply of defective carpeting that the pursuers had then supplied to and laid for one of their customers. It was held that any alleged contributory negligence by the pursuers in the way they laid the carpet was not in any event relevant in a case based on the carpet being defective. The leading Scottish text on contract law<sup>963</sup> points to the wider definition of “fault” for the legislation as it applies to Scotland, as resulting in the position being that “there is a stronger case in Scotland [i. e. than in England] for saying that the Act can apply to a breach of contract”.

## (10.) Prescription

**257. General** Often still the most important difference, as much in practice as for legal scholarship, between contractual and non-contractual compensation liability concerns the respective laws of limitation. Few legal systems have succeeded in ensuring that there has been either a complete, or at least a far-reaching, convergence of the limitation rules of both regimes. Joining the “system-internal” differences between contractual and non-contractual liability, is the fact that in the member states of the EU, totally different limitation periods are applied to the two regimes. All together it amounts to a colourful patchwork, to which the law of the Directives up to this point (which usually provide for a three-year limitation period)<sup>964</sup> has not been able to bring order.

**258. Austria** In Austria tortious and contractual compensation claims were already expressly treated equally through an amendment to the ABGB in the year 1916. Before it was disputed whether breaches of contract were included in the period of § 1489 ABGB.<sup>965</sup> For claims for compensation, today two limitation periods exist. Following § 1489 sentence 1 ABGB compensation claims are limited to a maximum of three years from the time when the damage and tortfeasor become known to the injured party (a so-called short limitation). A limitation period of 30 years (a so-called long limitation), is provided for every case in which the injured party has not got to know of the damage or tortfeasor, or the damage came about from one or more deliberate criminal acts which are

<sup>960</sup> *Report on Civil Liability – Contribution* (Scot. Law Com. No 115 (1988) paras 4.16 and 4.17. See also *Report on Remedies for Breach of Contract* (Scot Law Com No 174 (1999) Part 4.

<sup>961</sup> *Concrete Products (Kirkcaldy) Ltd v Anderson and Menzies*, 1996 SLT 587.

<sup>962</sup> *Lancashire Textiles (Jersey) Ltd v Thomson Shepherd & Co Ltd*, 1985 SC 135; 1986 SLT 41. For a discussion of the whole question by a Scottish writer see David Logan, ‘Contributory Fault in Contract – A Step back’ 2000 SLT (Articles) 81-84.

<sup>963</sup> W M McBryde, *The Law of Contract in Scotland*<sup>2</sup> (2001).

<sup>964</sup> Overview by von Bar, *The Common European Law of Torts*, vol. 1 (1998), para. 395.

<sup>965</sup> See demonstrations by Koziol, *Haftpflichtrecht* I<sup>3</sup> (1997) no. 15/9, p. 485.

punishable by a restriction of freedom of at least one year (§ 1489 sentence 2 ABGB). The short limitation period begins when the injured party recognizes the damage and the tortfeasor well enough, that a case with a view to success can be put forward.<sup>966</sup> In today's leading view the short as well as the long limitation period first start to run with the actual appearance of the damage.<sup>967</sup> For foreseeable consequential damage, an action must commence upon the ascertainment within the short limitation period.<sup>968</sup>

**259. The Netherlands** A further convincing example for the convergence of tortious and contractual limitation periods is provided by Dutch law. Art. 3:310 BW works with a limitation period of five years. The period begins on the day on which the injured party knew of the damage and the liable person. Independent of this knowledge, compensation claims are limited to twenty years after the damaging event. Art. 3:310 BW concerns compensation claims of all types, in particular those due to contractual non-performance (*wanprestatie*) and those from tort, but also compensation claims from *negotiorum gestio* and unjustified enrichment law. Particular rules concern damage to the environment (para. (2)) and sexual offences to the detriment of a minor (para. (3)). The start of the limitation period requires positive knowledge of the damage which for example, in cases of liability for damage to health, can be lacking for a long time. It is not however, necessary to have exact knowledge of the extent of the damage. In respect of the requirement of the knowledge of the tortfeasor, in the reasoning behind the law, the example of the transition of the debt to an heir of the tortfeasor not known to the injured party, is found.<sup>969</sup> If the injured party is psychologically not in a position to make a claim as a consequence of the inappropriate conduct of the defendant, the five year (in contrast to the twenty year)<sup>970</sup> limitation period does not start to run.<sup>971</sup> Art. 6:191 BW provides a particular rule for the law of strict product liability which the Product Liability Directive copied.

**260. Sweden** In Sweden also, contractual and non-contractual compensation claims in principle are limited by the same rules. The usual limitation for contractual as well as for tortious liability is ten years (§ 2 [1] limitation law [*Preskriptionslag* (1981:130)]). Claims against consumers from contracts concluded with them in principle lapse in three years (§ 2 [(2)] limitation law). Compensation claims arising from a criminal act do not lapse, following § 3 loc.cit., before the state's prosecution claim lapses. If the perpetrator is unappealably convicted due to the criminal act, the compensation claim lapses at the earliest one year after the conviction is no longer open to appeal. Admittedly for individual areas special limitation law rules exist, which can also make the problem of the concurrence of claims relevant in Sweden (for example in freight law and the law of strict liability).

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<sup>966</sup> OGH 13th November 1979, SZ 52/167.

<sup>967</sup> OGH (strengthened senate) 19th December 1995, JBl 1996, 311 note *Apathy*.

<sup>968</sup> OGH 29th February 1996, SZ 69/55.

<sup>969</sup> MvA II, Parlementaire Geschiedenis 3, p. 924.

<sup>970</sup> H.R. 25th June 1999, NJ 2000, 16.

<sup>971</sup> H.R. 23rd October 1998, NJ 2000, 15.

**261. United Kingdom** Matters in the United Kingdom are particularly complicated due to the fact that the law governing the periods of limitation for actions based on breach of contract and on tort/delict differs between England and Scotland, except with respect to personal injury cases (where the rules are largely identical). As a matter of juristic classification all the time limit rules in English law are “limitation” rules, i. e., rules which make it impossible to bring an action to enforce the right, which still notionally exists. In Scotland, other than in personal injury cases, all the rules are rules of (extinctive) prescription, i. e. rules which result in the right ceasing to exist. The rules in English law are based on the Limitation Act 1980. The rules in Scotland are based on the Prescription and Limitation (Scotland) Act 1973, as amended, which incorporates the provisions for personal injury cases, that were previously in a United Kingdom Statute.

**262. England and Wales** English law has separate provisions for actions in contract<sup>972</sup> and for actions in tort.<sup>973</sup> Apart from in personal injury cases (where the period is 3 years) the period is 6 years.

**263. Contract law** In the case of contractual actions, this period commences with the date on which the breach occurs.<sup>974</sup> This means that the time starts running in many situations before any loss has resulted to the other party. It has been a reason why claims have sometimes been taken on the basis of the tort of negligence against a contract breaker.<sup>975</sup> There is a provision that if there is fraud or the deliberate concealment of a breach of contract, the period runs from when it is discovered or could have been discovered with reasonable diligence.<sup>976</sup> But there are no provisions dealing with latent damage that apply to a claim based on breach of contract.<sup>977</sup>

**264. Tort law** The position with the law of tort is complicated by the distinction in English law between those torts which are “actionable *per se*” and those which are actionable only on proof of damage. In all tort cases the period is 6 years from the date on which the act is committed. With a tort that is actionable *per se* time runs regardless of whether or not the person who later claims, knows of the potential claim. With other torts, time runs from the date of the damage. In cases where the loss is purely economic, in the form that the claimant had entered into a disadvantageous transaction as a result of advice given by the defendant, there has been some doubt as to what the point in time is, that constitutes this date. The trend is to take a pragmatic approach. For instance, in a situation where a lender has advanced money on security to a third party as a result of the defendant’s negligent advice, and the third party later defaults on the loan, the date may

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<sup>972</sup> Limitation Act 1980 section 5.

<sup>973</sup> Limitation Act 1980 section 2.

<sup>974</sup> This is clearly illustrated by the case of *Gulf Oil (Great Britain) Ltd v Phillis* [1998] PNLR 166.

<sup>975</sup> As in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145.

<sup>976</sup> Limitation Act 1980 section 32.

<sup>977</sup> Limitation Act 1980 section 14A, reluctantly held to be confined to *tortious* claims based on negligence: *Societe Commerciale de Reassurance v Eras (International) Ltd* [1992] 1 Lloyd’s Report 570 CA per Mustill L.J.

be taken as the time when there is some measurable loss.<sup>978</sup> In a case where as a result of negligent advice from her solicitor, a client granted a security over her immoveable property in respect of a business loan to her son by a third party, the date of the damage was taken as the date of the security.<sup>979</sup> Similarly in a case where a solicitor negligently advised an employer that terms in contracts with his employees restricting their ability to take up employment elsewhere were valid, the date was taken as the date of the advice, the loss being the risk of the employees leaving. However, there is a distinct tendency to consider that a later rather than an earlier date is the one at which the loss becomes a reality, as where a negligent failure by a solicitor to advise that a client's investment business was such, that it had to comply with certain statutory controls on such business, the loss was held to be on each date that an investment was made.<sup>980</sup> Provision is made for extending the period in different ways in respect of latent damage, but such provisions are confined to personal injury claims based on negligence,<sup>981</sup> product liability claims of all types,<sup>982</sup> and (separately) for other negligence actions.<sup>983</sup> In this last group the period if "material facts about the damage" were not known to the party, is 3 years, running from the time when they became so known.

**265. Criticism** The current rules, both as they distinguish between actions based on breach of contract, and as they deal with latent damage in tort cases,<sup>984</sup> have been severely criticised by the Law Commission. A new statutory framework has been recommended. This would provide that the period for the reparation obligation in respect of both breach of contract and liability in tort, would run from the date on which the claimant knows or ought to know: (i) the facts which gave rise to the cause of action; (ii) the identity of the defendant; and (iii) in the event that the claimant has suffered injury, loss or damage, or that the defendant has received a benefit, that the loss, damage, injury or benefit was significant.

**266. Scotland** In contrast to the position in England, Scotland has a unified approach to time running for cases of contract and for cases of delict. The period is 5 years in both cases, except in personal injury cases (see further below), for which it is 3.<sup>985</sup> There are, however, detailed provisions dealing with latent damage cases, whether based on breach of contract or on delict, which apply until a period of 20 years has run from the actual happening of the damage, though latent. In both contract and delict cases, time starts to run from "the date on which loss or injury arises as a result of an act, neglect or default".<sup>986</sup> In cases where the defendant's acts constitute a continuing process, as for instance in cases of nuisance through pollution, or in building works disturbing another

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<sup>978</sup> *Nykredit plc v Edward Erdman Ltd* [1997] 1 W.L.R. 1637 (HL).

<sup>979</sup> *Foster v Outred & Co* [1981] 1 W.L.R. 86.

<sup>980</sup> *Gordon v J B Wheatley & Co.* [2000] WL 665428 (CA).

<sup>981</sup> There is no special provision for latent damage where personal injury is intentionally caused.

<sup>982</sup> Under Consumer Protection Act 1987 – implementing the European "strict" liability regime.

<sup>983</sup> Limitation Act 1980 section 14A.

<sup>984</sup> Limitation of Actions, p. 3.

<sup>985</sup> The period for defamation is also 3 years as a result of a special provision.

<sup>986</sup> Prescription and Limitation (Scotland) Act 1973 section 11.

part of a building, the period does not start until the end of the process.<sup>987</sup> There is an important provision<sup>988</sup> dealing with latent damage, that means the 5 year period does not start to run in any case (other than personal injury cases which have their own special provisions), until the claimant knew or “by reasonable diligence should have become aware” of the harm. As has occurred with the English legislation, there has also been some difficulty in Scotland in determining when the time starts running for the event that a case is based on advice that results in a party entering into a disadvantageous contract with a third party. In Scotland this is relevant also if the claim is based on breach of contract as opposed to delict, since the approach is a unified one whatever the basis of the claim. There is no clear trend in the case law to determine whether the date of entering into the transaction with the third party is the relevant date, or whether a later date, if it can be shown that no economic impact of a material sort occurred at the time of entering into the transaction, is relevant. In one case it has been held that where the transaction was one for purchase of an asset, the loss would only be taken as occurring when that asset was then later realized by the claimant, in a case where a number of contingencies had intervened in the period between the purchase and a later time when the asset was then realized.<sup>989</sup> By contrast, however, in another case where as a result of the defendant’s advice, the pursuer lent money to a borrower who defaulted, and whose credit worthiness was poor at the time of the loan, which should have been pointed out by the defendant in giving the advice, the moment of lending the money was treated as the time from which the period of prescription began to run.<sup>990</sup> This had much to do with the fact that the borrower’s financial position from the outset, was such as to make the granting of any loan inadvisable.

**267. Personal injury actions** In both England and Scotland the period is one of 3 years from the date of the injury. There are provisions dealing with situations of lack of knowledge and latent damage. In England these only applied to cases based on negligence (and associate vicarious liability) and have recently been held not applicable to a case of vicarious liability in respect of sexual abuse committed intentionally.<sup>991</sup> In both jurisdictions these provisions have no limit of time on their effect. For instance, some cases of exposure to damaging workplace environments, such as industrial deafness and lung disease cases have been raised decades after the claimant worked in that environment, as the disease process can be extremely long in manifesting itself. The provisions dealing with lack of knowledge, for instance, of the identity of the party responsible, are extremely complex in the Scottish legislation. In Scotland as in England there is now a discretionary provision permitting the court to extend the period of time, anyway. The Scottish provision which was introduced on top of other existing specific provisions, is entirely general.<sup>992</sup> Though the English provision lists various factors that

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<sup>987</sup> *Richardson v Quercus Ltd*; 1999 S.C. 278.

<sup>988</sup> Section 11(3).

<sup>989</sup> *Riddick v Shaumessy, Quigley & McColl* 1981 S.L.T. (Notes) 89.

<sup>990</sup> *Osbourne & Hunter Ltd v Hardie Caldwell & Others* 1999 S.L.T. 153.

<sup>991</sup> *Various Claimants v Bryn Alyn Community (Holdings) Ltd (In Liquidation) and Royal and Sun Alliance plc [2003] EWCA Civ 85*.

<sup>992</sup> Prescription and Limitation (Scotland) Act 1973 s 19A.

are relevant, such as the length of time since the events, it has been held that it is nonetheless one which (like the Scottish provision) directs the judge generally to weigh-up the fairness between the parties, of either applying or not applying the provision to extend the time limit.

(a) Tort law

**268. France and Belgium** In the French legal system, the limitation period for tort law claims is dependant upon the procedural law path which the plaintiff chooses to pursue. In accordance with art. 3 *Code de procédure pénale*,<sup>993</sup> an *action civile* can be raised with the existence of an *action publique* together with the latter before the criminal law judge. An *action civile* raised before a criminal law judge, follows the rules which are applied to an *action publique*. Accordingly the limitation of the *action civile* also sets the limitation of the relevant *action publique*.<sup>994</sup> The basic rules in relation to the limitation of an *action publique* are found in arts. 7-9 *Code de procédure pénale*. Depending on the crime, the state's prosecution claim lapses, and with it the corresponding civil law compensation claim, after between one and ten years. If the plaintiff sues in a civil court, then it depends upon the limitation law of the CC.<sup>995</sup> In light of this it is set out in art. 10 (1) *Code de procédure pénale*, that the civil action is time-barred according to the rules of the Civil Code and that this action may not be brought before the criminal court after the expiry of the public prosecution limitation period. Art. 2270-1 CC contains the basic rule for the limitation of tort law legal actions which have been raised before a civil law court, and reads: "Actions for tort liability are barred after ten years from the manifestation of the injury or of its aggravation. Where the injury is caused by torture and acts of cruelty, assault or sexual aggressions committed against a minor, the action in tort liability is barred after twenty years." In accordance with art. 2262bis (2) of the Belgian CC all non-contractual compensation claims lapse after five years from the time the injured party knew of the damage or its worsening and of the identity of the person liable. In accordance with para. 3 loc.cit. such claims lapse under all circumstances after twenty years from the time, in which the event causing damage took place. In accordance with art. 26 V.T.SV.,<sup>996</sup> civil law compensation claims arising from criminal acts also lapse according to the rules of the CC or relevant particular laws. However, they do not lapse before the criminal law prosecution.

**269. Italy** Italy usually works with a five year limitation period in tort law, which begins with the day on which the tort took place (art. 2947 (1) CC). Claims from road traffic accidents lapse after two years (art. 2947 (2) CC). Art. 2947 (3) CC is furthermore to be noted: "In any case, if the act is considered a criminal offence by the law and a longer time limit of prescription is established for the offence, such a longer time limit also

<sup>993</sup> The text is available online in an English version under [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpptextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm).

<sup>994</sup> *le Tourneau and Cadiet*, Droit de la responsabilité et des contrats (2002/2003), no. 591.

<sup>995</sup> *le Tourneau and Cadiet* loc.cit.

<sup>996</sup> *Voorafgaande Titel Wetboek van Strafvordering* ("First Title of the Law Book of Criminal Procedural Law") in the setting of the law of 10th June 1998.

applies to the civil action. However, if the offence is extinguished for reasons other than prescription, or if a final judgment was rendered in the penal proceedings, the right to compensation for damages is prescribed in the time limits indicated in the first two paragraphs, such time limits beginning to run on the date when the offence has been extinguished or from the date when the judgment has become final.” It can often be questionable what a tortious claim in the sense of art. 2947 CC is. For example, the claim of the first purchaser against the second purchaser (but first to be registered, compare art. 2644 CC), of a twice-sold piece of realty, was classified as tortious.<sup>997</sup> A claim for the restoration of the original circumstances as a result of the breach of building provisions in art. 872 CC is likewise subject to the short tortious limitation period, if it is asserted as a compensation claim.<sup>998</sup> It falls under the longer full limitation period, on the other hand, if it is to be considered as a material action. After five years (art. 2947 CC) the compensation claim for damage caused in an emergency (art. 2045 CC), lapses.<sup>999</sup> The claim of an insurer, arising from art. 1916 CC, who has compensated the insured party vis-à-vis the liable third party is likewise subject to the short limitation period from art. 2947 CC.<sup>1000</sup>

**270. Spain** In Spain the difference between contractual and non-contractual limitations for compensation claims is particularly big. Following art. 1968 CC non-contractual compensation claims “from fault or negligence” lapse after one year from the injured party knowing of the event. Moreover, this extremely short limitation period (from its wording), not only applies to claims from art. 1902 CC, but also claims from strict liability from the articles following art. 1902 in the CC.<sup>1001</sup> Art. 1968 CC admittedly only concerns the limitation for torts which do not represent criminal acts. In the new *Código Penal* there is no express limitation provision to say what this limitation concerns. The courts, in order to fill in these gaps for the protection of the victim,<sup>1002</sup> have fallen back not on art. 1968, but rather on art. 1964 CC, which provides for a fifteen year limitation for personal claims.<sup>1003</sup> One of the arguments is, that civil law liability can not end before criminal law liability does.<sup>1004</sup> If for whatever reason, there is no criminal law judgment, then the limitation period of one year remains.<sup>1005</sup> That is only

<sup>997</sup> Cass. 18th August 1990, n. 8403, Foro it. 1991, I, 2473.

<sup>998</sup> *Roselli-Vitucci*, La prescrizione e la decadenza, Trattato di diritto privato diretto da Rescigno, 20, Torino, 1998, 560.

<sup>999</sup> Cass. 27th November 1972, n. 3464, Foro it. 1973, I, 1134.

<sup>1000</sup> Cass. 15th January 2002, n. 366, Giust. civ. Mass. 2002, 60.

<sup>1001</sup> *Díez-Picazo* in *Paz-Ares/Díez-Picazo/Bercovitz/Salvador*, Comentario del Código Civil, II<sup>2</sup> (1993) 2156.

<sup>1002</sup> *Yzquierdo Tolsada* in *Reglero Campos* (ed.), Tratado de Responsabilidad Civil (2002) 476 and *Lacruz Berdejo*, Elementos de Derecho Civil, vol. 2: Derecho de Obligaciones, part 2: Contratos y cuasicontratos. Delito y Cuasidelito. (1999) 520.

<sup>1003</sup> T.S. 15th November 1986, RAJ 1986 (4) p. 6239, no. 6435; T.S. 21 June 1985, RAJ 1985 (2) p. 2846, no. 3307.

<sup>1004</sup> T.S. 21st June 1985, RAJ 1985 (2), p. 2846, no. 3307.

<sup>1005</sup> T.S. 20th January 1992, RAJ 1992 (1) p. 239, no. 191. In the case of the ending of the criminal

different, if the criminal law proceedings have to be halted as a consequence of the death of the defendant.<sup>1006</sup>

**271. Portugal** In Portugal also, the law of limitation provides the most important difference between contractual and tortious liability. Following art. 498 (1) of the Portuguese CC, which applies as much for fault-based as for strict liability (art. 499 CC), and above this for *culpa in contrahendo* (art. 227 (2)), a claim for compensation lapses “in a period of three years from the point in time in which the injured party attained knowledge of the right he is entitled to, and even without knowledge of the person responsible and the full extent of the damage regardless of the regular limitation,<sup>1007</sup> if the corresponding period has lapsed at the point in time of the damaging event.”<sup>1008</sup> If the disallowed conduct represents a criminal act for which the law provides a longer limitation period, the latter period is to be used, following art. 498 (3) CC.

**272. Germany** Under German law, tortious compensation claims in accordance with § 195 BGB, lapse in principle after the usual limitation period of three years. The standard limitation begins according to § 199 (1) BGB with the end of the year in which the claim came into being and in which the obligee knew of, or grossly negligently did not come to know of, the circumstances providing the basis of the claim and the person who is the debtor. § 199 (4) BGB determines though, that in principle all claims without consideration of the knowledge, or gross negligent lack of knowledge, lapse after ten years of the coming into being of the damage. Excluded from this are compensation claims which are covered by the special rules of (2) and (3). Following § 199 (2) BGB, compensation claims which are based on injury to life, body, health or freedom, without consideration of their coming into being and of the knowledge or gross negligent lack of knowledge, lapse after 30 years from the committing of the act, the breach of duty or other event which caused the damage. Other compensation claims (in particular due to breaches of ownership and property damage) lapse, in accordance with § 199 (3) sentence 1 no. 1 BGB, without consideration of the knowledge or gross negligent lack of knowledge, after ten years of the coming into being of the damage, or in accordance with (3) sentence 1 no. 2 without consideration of the coming into being of the damage or of the knowledge or gross negligent lack of knowledge, after 30 years from the committing of the act, breach of duty or other event which caused the damage. Following § 199 (3) sentence 2 BGB the period respectively ending earlier is decisive. Following § 852 BGB, the party bound to compensate, who has been enriched through his tort at the expense of the injured party, is also bound in unjust enrichment law, following the commencement of the limitation of the claim to compensation, to return that which was gained. This

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proceedings, in contrast to the judgment of the defendant, the period first starts with the ending of the proceedings: TC 30th June 1993, La Ley 1994 (1) 40.

<sup>1006</sup> T.S. 7th December 1989, RAJ 1989 p. 10274, no. 8806.

<sup>1007</sup> Art. 309 CC: twenty years.

<sup>1008</sup> The fundamentals on this *Vaz Serra*, Prescrição do direito de indemnização, BolMinJus 87 (1959) 36 ff.

claim lapses ten years after the coming into being of the damage; without consideration of the coming into being of the damage, then 30 years after the damaging act.

(b) Contract law

**273. France and Belgium** In the French legal system, art. 2262 CC contains the basic rule for the limitation of civil law claims: “All actions, in rem as well as in personam, are prescribed by thirty years, without the person who alleges that prescription being obliged to adduce a title, or a plea resulting from bad faith being allowed to be set up against him.” Contractual compensation claims therefore in principle lapse after 30 years. In the *Code civil* and in other laws and law books, many shorter limitation periods for specific types of contract and torts have been introduced, however. For instance art. 2270 CC provides for a ten year limitation period for “any natural or juridical person who may be liable under articles 1792 to 1792-4 of this Code for the liabilities and warranties by which they are weighed down in application of articles 1792 to 1792-2”. For contracts between or with traders, the ten year limitation period in art. L110-4 para (1) *Code de commerce* is the rule. In the Belgian legal system art. 2262bis (1) CC contains the basic rule in respect of the limitation of liability law claims.<sup>1009</sup> Following this rule, all *actions personnelles* lapse after ten years. In turn, there are a number of exceptions to this basic rule, for example the already mentioned shorter limitation period for tortious compensation claims. Particular provisions exist, however, for certain contract law compensation claims also. Thus art. 2276bis § 1 para (1) CC contains the rule that lawyers are freed from their professional liability after five years.

**274. Italy** The limitation period for contract law corresponds to the usual period and, as a rule is ten years (art. 2946 CC). A few particular limitation periods are determined by law (for example art. 2049 CC: contractual liability related to companies: five years; art. 2951: contractual liability related to shipment and carriage: one year from the time of the event giving rise to liability). If an action gives rise to contractual and non-contractual liability at the same time, the contractual claim can still be enforced even if the claim in tort law has already lapsed.<sup>1010</sup>

**275. Spain** Compensation claims from contractual liability lapse after 15 years, as do all personal claims (art. 1964 CC), if no special limitation period is specified for them. Such a special limitation period (of only six months!) is found, for example, in art. 1490 CC, which concerns guarantee claims due to latent defects and lack of title in the sold good.

**276. Portugal** In the framework of contractual liability in Portugal, in principle the general limitation period in art. 309 CC of 20 years is to be used. Specific limitation periods naturally prevail over this general rule.<sup>1011</sup> The application of the short tort law

<sup>1009</sup> Further *Claeys*, Een tweede blik op de nieuwe verjaringswet, in CBR Jaarboek 1998-99 (1999) 201-239, in particular 209-210.

<sup>1010</sup> *Roselli-Vitucci*, La prescrizione e la decadenza, Trattato di diritto privato diretto da Rescigno, 20 (1998) 451.

<sup>1011</sup> *Antunes Varela*, Obrigações em Geral I<sup>10</sup> 628; *Almeida Costa*, Obrigações<sup>9</sup>, p. 497, fn. 2.

limitation period of three years (art. 498 (1) CC) to parallel contractual claims, today<sup>1012</sup> no longer comes into consideration.<sup>1013</sup>

**277. Germany** In German law, since the modernisation of the law of obligations, the problem with regard to limitation of concurrence of actions between contractual and tortious liability has noticeably become less pronounced. This is due to the fact that the (new) three year period in § 195 BGB, in principle applies for all contractual primary and secondary claims.<sup>1014</sup> The limitation of claims for flawed guarantees in sales law and the law of contract for services, is now as before the object of special provisions. The usual sales law limitation period for non-performance claims as well as compensation and replacement of expenditure claims is two years (§ 438 (1) no. 3 BGB). In § 438 (1) no. 1 and 2 BGB the cases are determined for which a longer limitation period applies. Thus following § 438 (1) no. 1 BGB the limitation period is 30 years if the fault exists in a material right of a third party on the grounds of which, return of the purchased object can be demanded, or indeed in another right which has been registered in the land register. § 438 (1) no. 2 BGB stipulates a five year period for building works and objects which corresponding to their usual use, have been used for building and have caused its defectiveness. § 438 (2) BGB determines that the limitation regulated in para. 1 begins with the transfer for realty, and with the delivery of the object for the remainder. In the case of malicious silence over a defect, the general limitation period of three years applies (§§ 438 (3) sentence 1, 195 BGB). The limitation begins in this case when the purchaser knows of the defect, or without being grossly negligent must have known of it (§§ 438 (3) sentence 1, 199 (1) no. 2 BGB). Withdrawal and reduction in the context of limitation come under a particular regime (§§ 438, 218 BGB). The limitation of defect claims from contracts for services is regulated in § 634a BGB. Further particular periods are found in §§ 196, 197, 479, 548, 591b, 606 and 651g (2) BGB.

**278. Sweden** Although contractual and tortious limitation in Sweden follow in principle the same rules, in contract law certain particular limitations are to be noted. Thus the purchaser in accordance with § 32 (1) sales law and § 23 (1) no. 1 consumer sales law may “not refer to the defectiveness of the good if he does not inform the seller within a reasonable period after he noticed the defect, or must have noticed the defect (complaint).” In the case of consumer purchases, two months is still an appropriate period (no. 2 loc.cit.). “If the purchaser does not complain within two years after he has received the goods, he loses the right to refer to the defect if another right does not arise from a guarantee or a similar promise” (§ 32 (2) sales law; § 23 (3) consumer sales law. This two year limitation does not apply, however, if the seller acted with gross negligence

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<sup>1012</sup> The legal position was unclear for a long time, see on the one hand STJ 16th March 1976, RLJ 110 (1977-78) 83 and on the other STJ 7th May 1974, BolMinJus 237 (1974) 196 as well as STJ 20th June 1975, BolMinJus 248 (1975) 419.

<sup>1013</sup> STJ 22nd April 1986, BolMinJus 356 (1986) 349; STJ 25th June 1986, BolMinJus 358 (1986) 570. See further STJ 8th February 1994, CJ(ST) II (1994-1) p. 95: in the case of concurrence between contractual and non-contractual liability, the 20 year contract law limitation period has priority.

<sup>1014</sup> Palandt-Heimrichs, BGB<sup>62</sup>, § 195, no. 2 ff.

or unfaithfully (§ 33 sales law). § 17 (1) no. 3 of the consumer service law lengthens the complaint period for its area of application to two years, and for realty as long as ten years. Chap. 4 § 19b of the Real Property Act likewise fixes a ten year limitation period for actions in respect of defects in the law, commencing with the transfer. Further particular limitation rules (two years long) are recognized by the law of tenancy and the law of leasing (chap. 8 § 26 and chap. 12 § 61 Real Property Act). The duty to account of a commissioner (and of a *gestor*, whose management has been authorized<sup>1015</sup>) lapse one year after the completion of the job (chap. 18 § 9 Commercial Code (*handelsbalk*)).

**279. Obstacles to the smooth running of the internal market** Prescription (or limitation) periods of different length mean that businesses have to make provisions of unequal scope for contingent liabilities. That impacts on the question of equality of conditions of competition. The Community law that has been in existence for a long time is clearly posited on this. All the directives which deal with issues of liability unify the law not only with respect to the basis of liability, but also with respect to the length of time in which there is liability (the prescriptive period or period of limitation). In the border domain touching contractual and non-contractual liability, the determination of the appropriate prescriptive period is especially complicated, because that can only be achieved, once the complimentary law governing concurrence of actions is established (see further section 280 ff immediately below).

The example of a vehicle leasing business readily demonstrates effects on the operation of the internal market. If a motor vehicle is hired under Austrian law and returned having been damaged, the leasing company following the expiry of the short prescriptive period for contract can still rely on the longer prescriptive period for tort (§ 1489 ABGB) (see below at section 300). That possibility is denied to a leasing company under German law. The short prescriptive period for contract (§ 448 BGB) applies to the leasing company's disadvantage even with respect to non-contractual claims against third parties, who come within the area of protection of the contract of hire (such as claims by members of the family of the party to whom the vehicle was hired) (BGH 21st June 1988, NJW-RR 1988, 1358). A German car hire company at an airport near the border with Austria can therefore only do business under more disadvantageous conditions than those under which its Austrian competitor operates.

Our question whether the parallel applicability of contractual and tortious rules on prescription or limitation of actions gives rise to disadvantages elicited little response. So far as replied to, responses were in the negative. Only in isolated cases were we informed that the time periods in respect of material defects could lead to increased costs. It was not made clear, however, whether this assessment was related to the complexity of the legal position in the border area between contract and tort law or to the length of the prescription (or limitation) period.

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<sup>1015</sup> Håstad, Tjänster utan uppdrag (1973) 57.

### III. The Problem of Concurrence of Actions

#### (I.) Overview

**280. Alternative regimes and areas of overlap** Tort and contract law are only practically completely separate from one another where accidents take place between “strangers”, that is to say between persons who have no other legal connection other than the damaging event. Such situations are typical for road traffic, for example, where two cars are involved in a crash. Questions about the relationship between contract and tort law simply do not appear here, because there is no special relationship between the parties whatsoever. Furthermore, interference problems in the narrow sense are not present where a contractual relationship exists between the parties, but the breach of the contract does not represent a tort in any of the European legal systems. The pure non-performance of a contract furnishes an example.<sup>1016</sup> Thirdly, coordination questions do not arise, where the contractual obligee reacts to a breach of contract by the debtor with legal redress which is not at all recognized by tort law, for example, a claim for fulfilment, for rescission or for price reduction. Contract and tort claims therefore only overlap one another in relatively exact problem situations. They are firstly defined by both areas of law as having compensation as a legal consequence, and secondly that contract as well as tort law confirms a liability-founding breach of a duty to the disadvantage of the injured party, through the respective isolated application of their individual rules. If these rules are identical, then it is inconsequential from the point of view of substantive law, which basis for the claim the plaintiff uses. The differentiation between contract and tort law can itself be of importance in such situations, however, particularly in the area of international private and civil procedural law (international jurisdiction). Admittedly situations are more important, in which contractual and tortious liability confirm through their respective isolated application a breach of duty giving rise to compensation, but achieve different results in their legal judgments. These differences in legal consequences have been individually highlighted in the previous part of this study. For these differences, in every legal system it must be decided, whether one of the two regimes takes precedence in application over the other, and if that is the case, then which. This decision falls into the law of concurrence of actions, which is the subject of this part of the study.

**281. Priority of contract law?** If and up to now, one of the two regimes takes precedence of application over the other one, then it is always and in each country, contract law. It would at least theoretically be possible to strive for such a solution in the relationship, of a one day unified European contract law, to tort law which would have possibly remained not-unified. In any case this is the actual question: Does existing contractual liability oust parallel tortious liability, which depending upon the circumstances may be more or less favourable to the obligee? On the other hand, it is never the case that tort law ousts

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<sup>1016</sup> So with law e.g. Cass. 7th October 1998, n. 9911, *Foro it.* 1998, I, 3526. That is only different if the contents of the contractual obligation exist in the protection of an also non-contractual relevant legal interest, e.g. in the protection of health or of the property of the contracting partner.

other bases for a claim. In a situation where there is no valid claim which can be asserted according to the provisions of the law of tort because, for example, there is no legally relevant damage or negligence or because the conditions for the liability of others are not fulfilled, it always remains open to the claimant to pursue other bases for a claim which for him are more advantageous. This rule applies without exception and extends to the legal remedies available.<sup>1017</sup>

**282. Unity of tort law** As has been noted in the introduction, the situation shows that there are areas of tort law which have no relation whatsoever to the interference problem in the relationship to contract law, which in no way means that these areas are excluded from the further discussion about the alignment of contract law. There is “close to contract” and “distant from contract” tort law. That is a phenotypical, and not a genotypical differentiation. This is due to the fact that for its part, tort law represents a systematic unity and can at the most be effectively split into different parts in the area of strict liability. Even such a process puts – as in particular the French experiences with the implementation of the Product Liability Directive show – the systems in particular difficulties, which in the area of strict liability construct general clauses. The European Court of Justice in a decision from the 25th April 2002 passed judgment against France for the incorrect implementation of the Product Liability Directive (85/374).<sup>1018</sup> The ECJ established that the French Republic had breached its duties from article 9 para. 1 letter b, art. 3 para. 3 and art. 7 of the Directive, in that in article 1386-2 of the French Code Civile it had included damage under 500 Euros, in article 1386-7 para. 1 of the Code Civile it had determined that the supplier of a defective product is liable in every case and in the same way as the producer,<sup>1019</sup> and in article 1386-12 para. 2 of the Code Civile had provided for, that the producer, in order to be able to call upon the grounds for exculpation in accordance with article 7 letters d and e of the Directive, had to prove that he took suitable precautions, in order to prevent the effects of a defective product.

## (2.) Liability for Bodily Injury and Damage to Property

**283. Core contractual duties** In the area of liability for pure economic loss, there can also be a two-tier effect of the liability for damage as a consequence of a breach of contract. This is due to the fact that this damage can also represent relevant damage in tort law. A

<sup>1017</sup> The Study Group on a European Civil Code expresses the principle in art. 1:103 (c) of their (until now unpublished) outline on non-contractual liability law, as a rule, that the rights at one's disposal from the measures in tort law “do not affect remedies available on other legal grounds.”

<sup>1018</sup> ECJ 25th April 2002, D. 2002 AJ 1670; note *Rondey*.

<sup>1019</sup> The Council Resolution of 19th December 2002 reacted to this part of the judgment on amendment of the liability for defective products Directive (OJ 4 February 2003, C 26/2) (no. 9: “The Council considers that ... there is a need to assess whether Directive 85/374/EEC, as amended by Directive 1999/34/EC, should be modified in such a way as to allow for national rules on liability of suppliers on the same ground as the liability system in the Directive concerning liability of producers”).

great number of the cases in which contractual and tortious liability compete, are made up of injuries to body or health, as well as breaches of ownership (in particular in the form of property damage), which the debtor of a contract causes to the obligee. Two basic situations can be differentiated. In the first group of cases the breach of a specific contractual duty on the part of the debtor is involved. There are obviously many contracts whose purpose is aimed at the protection or amelioration of the state of health of another, and the same applies for the protection of their ownership interests. One only has to think of doctor's contracts, contracts for the carriage of persons, contracts for guarding, contracts for hiring or safekeeping and contracts for services relating to the repair of objects. If in the course of such contracts the debtor breaches one of his contractual duties, this action (subject to particular concurrence of actions rules) at least in the case of negligence, also normally represents at the same time a tort to the detriment of the obligee.

**284. Collateral contractual duties** At least as important, however, is that in many legal systems of the European Union, in addition the principle applies, that contracts also generate general duties of care in dealing with the rights, objects of legal protection and legally protected interests of the respective other contractual partner. Such "collateral" obligations do not normally have any relation to the content of the respective "primary" performance obligation and can therefore in principle become significant in every type of contract, in the framework of a purchase contract no less than in the framework of a lawyer or bank contract. The more ambitious a legal system is in the development of such *contractual* collateral obligations for the protection of interests already existing independent from the direct performance expectations formed by the contract, the more practical weight is given to the respective concurrence of actions rules, which give details of the relationship of contractual liability with parallel tortious liability. This correlation naturally applies the other way round: the narrower the scope of contractual duties is, the narrower the overlap with the area of application of tort law turn out to be. The consequence is in turn, that the area of application of the respective legal principles governing concurrence of actions becomes narrower. Their contents – and this is one of the additional complicating factors in the problem – can likewise have repercussions for the extent of collateral and protection obligations generated by contract law, though. A concurrence of actions rule which grants in principle contractual liability priority of application over tortious liability, has to keep the area of contractual liability narrow in the interest of protecting the victim, if tort law is more favourable to an injured party in an individual case than contract law (for example, because the latter requires fault, and the tort does not). The following text therefore first of all has to involve an overview of the concept of contractual liability for the breach of collateral obligations.

**285. France** In the French legal system, for the determination, type and scope of the obligations which are the consequence of a concrete contract, the *principe de l'autonomie de la volonté* is taken as the starting point. From this principle it follows, so it is said, that the contracting partners as a rule are only bound to what they both really wanted to be bound to.<sup>1020</sup> Due to the fact that the contracting parties in a normal case can not

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<sup>1020</sup> Bénabent, Les obligations<sup>8</sup>, no. 270 p. 191.

expressly regulate all questions, art. 1135 CC provides the principle that the contracting parties are not only bound to what they have explicitly agreed, but likewise to all consequences which *équité*, customs and the law attribute to a contract of its nature. Since the beginning of the 20th century the courts have therefore stated more precisely many obligations which result from a contract, even though they were not expressly agreed.<sup>1021</sup>

One example amongst hundreds is found in a decision of the French *Cour de Cassation* of 7th July 1992.<sup>1022</sup> The *Cour* decided, that a garage owner, in the framework of a *contrat d'entreprise* concerning the repair of an automobile concluded by him, also had the duty to guard the vehicle in his care like a *bon père de famille*. With the breach of this duty, he was consequently liable to the obligee for the theft of objects from the vehicle, committed by a third party.

**286. Belgium** Art. 1135 of the Belgian CC agrees word for word with art. 1135 of the French CC. In the Belgian legal academia, moreover, a connection between art. 1135 CC and art. 1134 (3) CC is often established, in which contracts are to be fulfilled in accordance with the principle of loyalty and good faith. Art. 1135 CC is used in order to support the theory of the “extended function” of good faith in the interpretation of contracts.<sup>1023</sup> The effects of this theory of the “extended function of good faith” are in diverse current case law.<sup>1024</sup> A concrete example is found in decisions in which the duty of the injured contracting party to take honest measures to limit their damage, is assumed.

**287. Italy** The Italian legal academia differentiates, for the law of contractual collateral duties, between *obblighi accessori* and *obblighi sussidiari*. The breach of *obblighi accessori* has the same legal consequences as the breach of principle obligations. Counting as such an obligation is the general duty of the parties to conduct themselves honestly (art. 1175 CC). Counting as collateral obligations, on the other hand, are those from arts. 1176-1179<sup>1025</sup> as well as the obligations which join the performance obligations as protective obligations. Their basis is, in addition to the will of the parties, an objective extension of the contractual obligation programme *ex fide bona*.<sup>1026</sup> A clear example for such a general duty of care is set up by article 2087 CC, which imposes upon the employer the duty to provide all the safety measures to protect the bodily and moral integrity of his employee. A breach of this obligation leads to contractual liability. At the same time, however, a tort in the sense of art. 2043 CC is present. Therefore in the case of fault, following the case law of the *Corte di Cassazione*, the *danno biologico* of the employee can be compen-

<sup>1021</sup> *Bénabent* loc.cit. nos. 281-284 p. 199-203.

<sup>1022</sup> Cass.civ. 7th July 1992, Bull. Civ. 1992, I, Nr. 222 p. 148.

<sup>1023</sup> *van Gerven*, *Verbintenissenrecht* I<sup>6</sup> 42.

<sup>1024</sup> Further *Stijns/Dirk Van Gerven/Wéry*, *Chronique de jurisprudence. Les obligations: Les sources* (1985-1995), JT 1996 (p. 689-752), no. 35 p. 702-703.

<sup>1025</sup> *Canata*, *Le obbligazioni in generale*, *Trattato di diritto privato diretto da Rescigno*, 9, *Obbligazioni e contratti*, Tomo primo (1992) 35-60.

<sup>1026</sup> *Di Majo*, *La responsabilità contrattuale* (1997) 23.

sated under both regimes.<sup>1027</sup> For the law of transportation contracts, art. 1681 CC provides for contractual liability for the injury of passengers or the damage of their goods, and a similar liability norm is found in the freight law determination of art. 1693 CC for loss in the carriage of goods. The *Corte di Cassazione* has even gone further and has confirmed the existence of contractual protection obligations even in situations in which, technically speaking, there is a lack of a contract between the obligee and the debtor.<sup>1028</sup> One case involved hospital doctors, where the hospital was the actual contracting partner of the patients. The doctor would not be seen as just any third party in relation to the patient in such a case, but would much rather be seen as being in a relationship of trust much like a contract, with the patient.<sup>1029</sup> Likewise in the law of doctor's liability, the *Corte di Cassazione* accepted the concept of a contract with the effect of protection in the favour of third parties, which had been developed in Germany.<sup>1030</sup> It involved claims of a child born ill, arising from the contract of its mother with the hospital. The corresponding tort law claim had already lapsed. Tort law is, however, more favourable to the injured party where liability independent of fault is judged, and the case law then also falls back on tortious liability. Accidents in a supermarket provide an example, when caused by floor covering which is unsafe for the customers, because in this case liability from art. 2051 CC is considered.<sup>1031</sup>

**288. Spain** Spanish case law restricts contractual liability "to the strict sphere of what is agreed between the parties."<sup>1032</sup> Belonging to these are also obligations which arise from the rule of loyalty and good faith.<sup>1033</sup> When and under which conditions culpable bodily injuries and ownership damage, which take place in the framework of the conclusion of a contractual relationship, found contractual or only non-contractual liability, has not been explicitly responded to in Spanish law.<sup>1034</sup> The case law does not provide a clear line on this either. Damage to an object in the framework of a safe-deposit contract, for example, has been settled in tort law,<sup>1035</sup> damage to transported goods<sup>1036</sup> or to a rented

<sup>1027</sup> So Cass.civ. sez. lav., 21st december 1998, n. 12763, in Giust. civ. Mass. 1998, 2635. The requirement of fault is, however, controversial in the area of contractual liability in legal literature.

<sup>1028</sup> Cass. 22nd January 1999, n. 589, *Corriere giuridico* 1999, 441, note *di Majo*.

<sup>1029</sup> The concept goes back to *Castronovo*, *L'obbligazione senza prestazione. Ai confini tra contratto e torto*, in: *Scritti in onore di L. Mengoni*, I (1995) 196; see further *Castronovo*, *La nuova responsabilità civile*<sup>2</sup> (1997) 224.

<sup>1030</sup> Cass. 22nd November 1993, n. 11503, *Giur. It.* 1994, I, 1, 550, note *Carusi*, following an idea developed by *Castronovo*, *Obblighi di protezione e tutela del terzo*, *Jus* 1976, 123.

<sup>1031</sup> Cass. 13th February 2002, n. 2075, *Giust. civ. Mass.* 2002, 233 (where the legal action was dismissed, however, because the causation had not been proved).

<sup>1032</sup> T.S. 8th April 1999, RAJ 1999 (2) p. 4155, no. 2660.

<sup>1033</sup> *Diéz-Picazo*, *Derecho de daños* (1999) 265.

<sup>1034</sup> *Diéz-Picazo* loc.cit. 250.

<sup>1035</sup> T.S. 30th April 1991, RAJ 1991 (3) p. 4224, no. 3109 oder T.S. 8th April 1999, RAJ 1999 (2) p. 4155, no. 2660 (theft of a car from the car park of a hotel).

<sup>1036</sup> T.S. 7th June 1991, RAJ 1991 (4) p. 6065, no. 4426.

object,<sup>1037</sup> on the other hand, in contract law. Similarly not-unified is the case law in the area of bodily injuries. The liability of an airline for the broken leg of a passenger as a consequence of a defective traveller is contractual in nature,<sup>1038</sup> but the liability of a ski-lift company in relation to a child is of a tortious nature.<sup>1039</sup>

**289. Germany** In German law, the characteristic main performance obligations in a contract, and the subsidiary performance obligations which aid the preparation, carrying out and securing of the main performance, are supplemented by so-called protection obligations (also called further conduct obligations).<sup>1040</sup> These protection obligations are embedded in § 242 BGB and the principle of good faith and loyalty contained within it.<sup>1041</sup> § 241 (2) BGB expressly refers to it. According to this, the obligation relationship following its contents, can oblige each party to the consideration of the rights, objects of legal protection and interests of the other party. Practically § 241 (2) BGB brings nothing new, but rather codifies a legal principle which has been generally recognized for a long time.<sup>1042</sup> In contrast to the idea of the performance obligations supporting the contractually strived-for *status ad quem*, the protection obligations involve the protection of the objects of legal protection and other rights of the other party. Their object of protection is the integrity interest of the other party, i. e. the *status quo* of his person and property.<sup>1043</sup> There is an obligation to conduct oneself during the conclusion of the contract so that the body, life, property and other objects of legal protection as well as the rights and interests of the other party are not injured. A further group of protection obligations are the obligations to provide information.<sup>1044</sup> The protection obligations exist as soon as the entry into contractual negotiations has taken place, so that culpable breach is interpreted as fault in the case of contractual negotiations. They continue during the carrying out of the contract. Finally, they can continue to exist even after the carrying out of the performance duties, until the parties involved have really separated (the culpable breach is then from time to time called *culpa post contractum finitum*).<sup>1045</sup> They possibly even cover persons who have no position as obligee in respect of the actual performance obligation (so-called contract with protective effects in favour of a third party).<sup>1046</sup> The protection obligations can therefore exist next to primary performance obligations as so-called subsidiary obligations (e. g. the obligation of a seller to not damage the household objects belonging to the purchaser, in the case of delivery of goods), or form the sole content of an obligation relationship (e. g. in the case of *culpa in contrahendo*, § 311 (2) and (3) BGB). They do not establish (in contrast to the performance obligations of § 241

<sup>1037</sup> T.S. 22nd July 1991, RAJ 1991 (4) p. 7330, no. 5406.

<sup>1038</sup> T.S. 17th December 1990, RAJ 1990 (8) p. 13170, no. 10281.

<sup>1039</sup> T.S. 10th June 1991, RAJ 1991, 4. Tlbd, p. 6072, no. 4431.

<sup>1040</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 241, no. 5 f.

<sup>1041</sup> Medicus, Schuldrecht I AT<sup>13</sup>, no. 5.

<sup>1042</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 241, no. 1.

<sup>1043</sup> MünchKomm-Kramer, BGB<sup>4</sup>, Introduction to § 241, no. 80; Palandt-Heinrichs, BGB<sup>62</sup>, § 241, no. 6.

<sup>1044</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 241, no. 7.

<sup>1045</sup> Medicus, Schuldrecht I AT<sup>13</sup>, no. 5.

<sup>1046</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 241, no. 7.

para. 1 BGB) a claim to performance. Their fulfilment is not capable of being sued for; their breach leads, however, to compensation claims from the breach of an obligation in accordance with § 280 BGB.<sup>1047</sup>

**290. Greece** The development of the German doctrine of the contractual collateral obligations to exercise due care with regard to the rights and legally protected interests of the respective other contractual partner, has found much accordance in Greek scholarship.<sup>1048</sup> These obligations are also called protection obligations there. Agreement exists, in that they arise from art. 288 CC (loyalty and good faith) and that the breach of them represents contractual unsatisfactory performance.<sup>1049</sup> Some supporters of the protection obligations doctrine approve, for the question of burden of proof, the application of the general rule applicable in tort law, after which the injured party has to prove the fault of the tortfeasor.<sup>1050</sup> The basis for this is that the protection obligations resemble the general tortious duty of care. The same is also proposed for the limitation. It is thus represented that either the tortious limitation period (five years), or the short period provided for particular types of contract is used, or in any case not the general contractual period (art. 249 CC: 20 years).<sup>1051</sup> There is, however, a strong group against this idea, who use the argument, to combat the concept of contractual protection obligations, that in their view there is a lack of a practical need for them in Greek law.<sup>1052</sup> The Greek case law appears to be rather restrained. It only applies contract law along side tort law, if it involves damage which has been caused by a lack of performance.<sup>1053</sup>

**291. Portugal** The influence of the German doctrine on contractual collateral obligations is visible in Portugal as well.<sup>1054</sup> As from § 242 BGB, from art. 762 (2) of the Portuguese CC contractual collateral duties for protection and care in relation to the person and the property of the contracting partner are deduced from the *princípio da boa fé*.<sup>1055</sup> Following art. 762 (2) CC both the debtor, with the carrying out of his performance and the obligee, with the carrying out of his claim have to conduct themselves honestly. The breach of a collateral duty represents malperformance of the contract

<sup>1047</sup> MünchKomm-Kramer, BGB<sup>4</sup>, Introduction to § 241, no. 80; Palandt-Heimrichs, BGB<sup>62</sup>, § 241, no. 7.

<sup>1048</sup> Georgiades/Stathopoulos (-Stathopoulos), CC II, Art. 288, no. 46; Androulidaki-Dimitriadou, Ai ypocheoiseis synallaktikis pisteos, passim; Zepos, Enochiko Dikaio I, 36.

<sup>1049</sup> Georgiades/Stathopoulos (-Stathopoulos), CC II, Introduction to Arts. 335-348, no. 19 f; Michaelides-Nouaros, Enochiko Dikaio, 167.

<sup>1050</sup> ErmAK (-Gasis), Introduction to Arts. 335-348, no. 77; ErmAK (-Michaelides-Nouaros), Art. 382 no. 25.

<sup>1051</sup> Androulidaki-Dimitriadou loc.cit. 231.

<sup>1052</sup> Pouliadis, Culpa in contrahendo und Schutz Dritter, 174 ff.

<sup>1053</sup> So e.g. CFI Agrinion 24/1957, Arch N 8/1957, 512 (sale of defective plant protection with consequential damage to the olive trees of the purchaser; liability from contract and tort).

<sup>1054</sup> Vaz Serra, Impossibilidade superveniente e cumprimento imperfeito imputáveis ao devedor BolMinJus 47 (1955) p. 5-97, 65-90, 95-97; Menezes Cordeiro, Da boa fé no direito civil I (1984) 603 ff.; Menezes Leitão, Obrigações II (2002) 265 ff.

<sup>1055</sup> Almeida Costa, Obrigações<sup>9</sup> p. 63, 505.

(*cumprimento defeituoso*); fault is in this respect assumed (art. 799 (1) CC). The breach of contractual collateral obligations is indeed treated as a matter of importance in connection with the defence of the non-fulfilled contract,<sup>1056</sup> but also establishes compensation claims following a decision of the Supreme Court of the 14th January 1997<sup>1057</sup> according to art. 798 CC.<sup>1058</sup> The case concerned a customer of a sport studio who incurred damage as a result of an unsafe piece of equipment.

**292. Sweden** In Swedish law, the fact that the culpa rule is also applicable in contract law (chap. 1 § 1 Liability Act), provides for a far-reaching symmetry of contractual liability with tortious liability in the area of liability for bodily injury and damage to property. Rightly though, attention is drawn to the fact that this culpa rule, in particular in the area of liability for omission, leads to different results depending upon whether contractual or non-contractual liability is involved.<sup>1059</sup> From recent case law of the Supreme Court, a judgment from the 6th November 2001 merits particular attention.<sup>1060</sup> During a break-in into the vault of a bank, bank lockers used by customers were also broken into. The bank's insurance company compensated the customers and sought redress from the security company which had made a mistake with gross negligence. The Supreme Court declined to give the insurance company a claim based on a contract closed between the bank and the security firm. It involved purely tortious liability whose requirements had not been fulfilled.

**293. United Kingdom** In both English and Scots law liability in respect of physical damage to property or personal injury arises on the basis of breach of contract if that harm is not too remote. There is no classification into different classes of contractual duty as central and ancillary, nor is the theory related to questions of good faith. The possibility of basing a claim on breach of contract is not affected by the fact that on the same facts a claim could be based on delict/tort. Given the background context of a contractual relationship, many of the standard instances of liability in delict/tort for negligently caused harm can equally be based on breach of contract. In practice it is unlikely that a case of this sort will be pled in contract in personal injury case as there is for them a unified law of time bar. In property damage cases, not associated with personal injury, there could on appropriate facts be an advantage with respect to the limitation period in English law, though not in Scots law. However, a claims based on the personal negligence of an employer in negligently failing to provide a safe place of work, or safe plant, or a safe system of work have been recognised as capable of being pled on the basis of breach of an implied term of the contract of employment (where there was difference in jurisdiction in respect of an accident abroad).<sup>1061</sup> Claims by clients against architects for physical damage resulting from negligent design or supervision of building works can be based on contract, as can such claims against construction companies. Claims in

<sup>1056</sup> STJ 15 October 1996, CJ (ST) IV (1996-3) p. 51, 53.

<sup>1057</sup> STJ 14 January 1997, CJ(ST) V (1997-1) p. 42-44.

<sup>1058</sup> See on this *von Bar*, *The Common European Law of Torts I* (1998), no. 462, p. 463.

<sup>1059</sup> *Bengtsson and Strömbäck*, *Skadeståndslagen*. En kommentar (2002) 34.

<sup>1060</sup> NJA 2001 p. 711.

<sup>1061</sup> *Matthews v Kuwait Bechtel* [1959] 2 Q.B. 57(CA).

respect of medical malpractice normally cannot be based on breach of contract, since the vast majority of medical treatments take place under the National Health Service, and it is thought that, given the public law background, in that context patients are not in a contractual relationship with either the healthcare provider,<sup>1062</sup> or with the doctors or other healthcare professionals. Contrary authority in Canada<sup>1063</sup> is unlikely to be followed, and has been forcibly argued to be inconsistent with the general principles of contract law.<sup>1064</sup> Claims based on breach of contract may also arise where there is implied in the contract an obligation to achieve a satisfactory quality in sale of and other supply of goods in respect of physical damage to property or personal injury resulting from a failure in that obligation. This has been recognised in commercial cases for instance where damage by fire has resulted<sup>1065</sup> and where pigs died as a consequence of goods for storage of pig feed being of unsatisfactory quality.<sup>1066</sup> It has also been recognised in consumer cases, as in a case where a child was blinded through a toy catapult that was of unsatisfactory quality.<sup>1067</sup> This continues to be the position in law even though since the introduction of strict products liability under the EC Directive<sup>1068</sup> there may be no advantage in the consumer pursuing the claim on this basis. It is possible by contract expressly to agree that a certain result will be achieved, which, where that result involves work on or treatment to property owned by a contracting party could result in strict liability in respect of damage to that property if that result is not achieved.<sup>1069</sup> But the terms of the contract would have unequivocally to provide for this.<sup>1070</sup> The same position could arise with private medical treatment, but it has been held that it would be extremely unlikely that a contract for medical treatment would be construed as providing for liability on this basis,<sup>1071</sup> though examples have been recognised by courts in North America in cases of cosmetic surgery.<sup>1072</sup> As a result of statutory exclusion of the railways from the default position at common law of strict liability in some<sup>1073</sup> carriage of goods

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<sup>1062</sup> *Pfizer Corporation v Ministry of Health* [1965] A.C. 512 (HL).

<sup>1063</sup> *Pittman Estate v Bain* (1994) 112 D.L.R. (4<sup>th</sup>) (Ont Gen Div).

<sup>1064</sup> *I Kennedy and A Grubb* (eds), *Principles of Medical Law* (1998) 5.08-5.09; *I Kennedy and A Grubb*, *Medical Law* (2000) 273.

<sup>1065</sup> *Medivance Instruments v Gaslane Pipework Services Ltd* [2002] EWCA Civ 500 – where, however, the case failed on the ground that there was no breach of the implied terms as to quality.

<sup>1066</sup> *Parsons v Uttley, Ingham & Co Ltd* [1978] Q.B. 791 – though it may be that the Court was incorrect in holding that this damage was not in the circumstances too remote.

<sup>1067</sup> *Godley v Perry* [1960] 1 W.L.R. 539.

<sup>1068</sup> Consumer Protection Act 1987 Part 1.

<sup>1069</sup> *Greaves & Co (Contractors) v Baynham Meikle & Partners* [1975] 1 W.L.R. 1095 per Lord Denning MR.

<sup>1070</sup> *Ibid.*

<sup>1071</sup> *Thake v Maurice* [1986] 1 All ER 497.

<sup>1072</sup> Discussed in *I Kennedy and A Grubb*, *Medical Law* (2000) 276.

<sup>1073</sup> Contracts with “common carriers”, where the rule in England derives from the common law, and in Scotland from reception of the *ius commune* understanding of the edict *nautae caupones stabularii*.

contracts,<sup>1074</sup> and anyhow because it is possible to contract out of the default position whatever form of transport is used, there is no advantage in seeing such claims as ones based on contract. The same position obtains with contracts involving the keeping of another's goods (bailment in English law); custody/deposit in Scots law.<sup>1075</sup>

### (3.) Approaches Adopted

**294. Basic concepts** The questions of concurrence of actions in the relation of the different parts of a private law system with one another, and here in turn, in particular in the relation between contract and tort, represent a problem which all EU member states are aware of. The Greek, German, Austrian and Portuguese legal academia differentiate the following competing legal categories: If one rule excludes the application of the other by operation of law, there is a *Gesetzeskonkurrenz* (the conflict is solved by that excluding rule being the sole basis of liability). In contrast, the term *Anspruchshäufung* ("accumulation of claims") describes the accumulation of claims, namely where one and the same act is capable of giving rise cumulatively to several claims existing side by side. An example is where a claim arises for damages in respect of harm already caused, and additionally for injunctive relief against further harm caused in the future. There is thirdly distinguished the concept of *alternative Anspruchshäufung* ("alternative accumulation of claims") which comprehends those situations where more than one basis of claim is possible but the claimant is entitled to elect which he wants to pursue. A fourth category is distinguished and covers where several claims in respect for the same damage exist which do not exclude each other. These are the categories of *Anspruchskonkurrenz* or *Anspruchsnormenkonkurrenz* ("concurring claims or concurring claim norms"). In the former category (concurring claims) the distinct bases can be relied on by the claimant and are not seen as affecting each other. The plaintiff, subject to any special rules in the national procedural law, does not in principle have to state the basis of his claim. (Of course, where the claim is based on more than one basis of liability he cannot through that obtain double compensation). The latter category (concurring claim norms) describes a theoretical variation where it is taken that only one claim exist although that one claim may be supported through consideration of more than one basis.<sup>1076</sup>

**295. The principle of non-cumul des responsabilités: Belgium and France** The principle of *Gesetzeskonkurrenz* is the starting point of the Belgian, French and Luxembourgian laws on the determination of the relationship between contract and tort law. This is because in these legal systems, liability in damages can not be contractual and tortious at the

<sup>1074</sup> Transport Act 1962.

<sup>1075</sup> The main instance of default strict liability was anyhow abolished by the Hotel Proprietors Act 1956.

<sup>1076</sup> *Koziol*, *Haftpflichtrecht I*<sup>3</sup>, nos. 17/1 ff; *Münchener Kommentar (-Kramer)*, BGB<sup>4</sup>, § 241, nos. 25 ff.; *Medicus*, *Schuldrecht I (Allgemeiner Teil)*<sup>13</sup>, § 32; *Vaz Serra*, *Responsabilidade contratual e responsabilidade extracontratual BolMinJus 85 (1959) 208 (230 ff)*; *Almeida Costa*, *Obrigações*<sup>9</sup> (2001) 473 ff; *Georgiades/Stathopoulos (-Georgiades)*, Art. 247, no. 29; *Georgiades*, *Diki 6/1975*, p. 43 ff.; *Deliyannis-Kornilakis*, *Eidiko Enochiko Dikaio III 110*.

same time. In cases of overlap and conflict, contract law prevails.<sup>1077</sup> The French case law allows for exceptions to the rule of the *non-cumul des responsabilités*, though. They appear above all in the case law of the criminal law courts. Following continuous case law of the *Chambre Criminelle* of the *Cour de Cassation* the criminal law courts do not have the authority to apply the law of contractual liability. If a criminal law court has to make a decision on a civil law compensation claim, in principle it applies non-contractual liability law, if the act committed at the same time represents a breach of contract.<sup>1078</sup> The Belgian case law gives the contracting party, which is damaged by a breach of contract which at the same time represents a criminal act, the right to choose between claims in contract and tort law.<sup>1079</sup> Aside from this, general tort law can come to be applied between the parties of a contract, if the *faute* of a contracting party does not represent the breach of a contractual obligation, but rather a general duty of care, and if it causes damage which has nothing to do with the unfulfilled contractual expectations.<sup>1080</sup>

**296. Italy** The principle of the *non-cumul des responsabilités* is a peculiarity above all of French law. In Italy it is generally recognized that contractual liability does not in principle replace parallel tortious liability. If one and the same action at the same time gives rise to contractual and tortious liability, the injured party can choose whether he follows up his contractual or tortious claim; the principle of concurring claims applies.<sup>1081</sup> It has practical importance above all in the area of passenger transportation (breach of contract leads to bodily harm).<sup>1082</sup> In the case of *trasporto di cortesia* the *Corte di Cassazione*<sup>1083</sup> recently affirmed that art. 2054 CC (strict liability for traffic accidents in tort law) applies also to persons travelling in the car by courtesy of the tortfeasor. Art. 2054 CC contains a general principle of the law on liability for traffic accidents which is independent from the reason for transportation, be it “contractual or ‘by courtesy’, onerous or gratuitous”. This is also a confirmation of the cumul principle.<sup>1084</sup> Apart from this it is recognized from the predominant case law that next to sales law liability from art. 1474 (2) CC for damage to other legally protected interests of the buyer

<sup>1077</sup> See for France *Henri and Léon Mazeaud, Jean Mazeaud*, continued by *François Chabas*, *Leçons de droit civil*, Tome II/Premier volume. Obligations. Théorie générale<sup>9</sup> (1998) no. 404 p. 402-403; for Belgium *Vandenberge e. a.*, *Overzicht van rechtspraak 1994-1999*, TPR 2000, no. 176; and for Luxembourg *Cour* 16th June 1982, *Pas. lux.* 25, 344.

<sup>1078</sup> *Viney*, *Traité de droit civil. Introduction à la responsabilité*<sup>2</sup> (Paris 1995) no. 223 p. 412.

<sup>1079</sup> *Vandenberge e. a.*, loc. cit. no. 178.

<sup>1080</sup> *Cass.* 4th June 1971, RW 1971-72, 371; *Cass.* 7th December 1973, RW 1973-74, 1597.

<sup>1081</sup> *Rossello*, *Responsabilità contrattuale ed extracontrattuale*, in: *Alpa/Bessone*, *La responsabilità civile I* (Torino 1987) 316-317; *Monateri*, *Manuale della responsabilità civile* (2001) 19-30; *Bianca*, *Diritto civile, La responsabilità*, V (1997) 554-555.

<sup>1082</sup> *Lopez de Gonzalo*, *La responsabilità civile del vettore*, in *Alpa/Bessone*, *La responsabilità civile*, IV, p. 32-37 *Cass.* 20th April 1989, n. 1855, *Foro it.* 1990, I, 1970; *Cass.* 28th January 1972, n. 226, *Giur. It.* 1972, I, 1, 1797; compare also (in respect of liability for animals, however) *Cass.* 19th January 1977, n. 261, *Giur. it.* 1978, I, 1, 1791.

<sup>1083</sup> *Cass.* 26th October 1998, n. 10629.

<sup>1084</sup> Likewise *Cass.* 21st January 2000, n. 681, *Nuova giur. civ. comm.* 2000, I, p. 65.

(his health, his property etc.), liability from art. 2043 CC (tort) can also come into consideration.<sup>1085</sup> One starts likewise in this respect from the principle of concurring claims.<sup>1086</sup> The legal basis which is more favourable to the injured party comes into fruition. That applies equally for bodily injury and property damage; following recent case law, moreover, also for damage to reputation,<sup>1087</sup> but not for pure economic loss.<sup>1088</sup>

**297. Spain** In Spanish law the situation following contradicting statements is somewhat unclear in the case law and academia. The leading academic view avoids a strict *non-cumul* principle.<sup>1089</sup> The case law usually follows the tendency, as has already been explained, of limiting contractual liability to the “*rigurosa órbita de lo pactado*”, to “the strict sphere of the agreed”.<sup>1090</sup> Its more precise determination appears to cause, now as before, difficulties though, not least because the *Tribunal Supremo* also adds the general obligation to go by the rule of loyalty and good faith, to this “contractual sphere”.<sup>1091</sup> The *Tribunal Supremo* has enabled the injured party, however, to assert both liability regimes alternatively or subsidiarily and even accepted that the courts, in the interest of the injured party, apply the liability regime which is more favourable to the injured party even if he had not made a claim for it.<sup>1092</sup>

**298. The Netherlands** In Dutch law it would in principle be, as has already been noted, conceivable to interpret a breach of contract as an intrusion upon a right in the sense of article 6:162 para. 1 BW. From the separate regulation of liability for the breach of contractual obligations in articles 6:74 ff. BW it suggests its fundamental priority of application over articles 6:162 ff. BW.<sup>1093</sup> Only in exceptional cases does contractual non-fulfilment at the same time represent a tort in the sense of article 6:162 BW, those being if the wrongfulness arises from different considerations than those of the (mere) breach of contract. Examples are provided by the damaging of an object belonging to the obligee which the debtor has possession of in the framework of a contract, or the breach of a safety obligation by the employer in respect of its employee. In such cases, concurring claims exist in the form of contractual and tortious liability.<sup>1094</sup>

<sup>1085</sup> Case law demonstrations by *Monateri*, *Cumulo di responsabilità contrattuale ed extra-contrattuale* (1989) 176.

<sup>1086</sup> Cass. 5th February 1998, n. 1158, *RGiur.it.* 1998, voce *Vendita* n. 45; Cass. 28th July 1986, n. 4833, *RGiur.it.* 1986, voce *Vendita* n. 77-78; Cass. 13 March 1980, n. 1696, *Giur. It.* 1980, I, 1, 1460; different still Cass. 9th February 1965, n. 205, *Rep. Foro it.* 1965, voce *Vendita*, n. 68.

<sup>1087</sup> Cass. 5th February 1998, n. 1158, *Giust.civ.Mass.* 1998, 243.

<sup>1088</sup> Cass. 29th November 1986, n. 7069, in *Mass. Foro it.* 1986.

<sup>1089</sup> Differing however e. g. *Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-Fernando Pantaleón Prieto)*, *Código Civil II*<sup>2</sup> (1993) 1979, who can support his view with a decision of the *Tribunal Supremo*, e. g. T.S. 16th May 1985, *RAJ* 1985 (2) p. 2028, no. 2396.

<sup>1090</sup> T.S. 19th June 1984, *RAJ* 1984 (2), p. 2482, no. 3250.

<sup>1091</sup> Further *Luis Díez-Picazo*, *Derecho de daños* (1999) 265.

<sup>1092</sup> T.S. 15th February 1993, *RAJ* 1993 (1), p. 987, no. 771.

<sup>1093</sup> *Asser-Hartkamp III*<sup>10</sup>, nos. 8-9, p. 9-10.

<sup>1094</sup> Further *Asser-Hartkamp III*<sup>10</sup> nos. 8-11 p. 9-12; *Jansen*, *Onrechtmatige daad: algemene bepalingen*, no. 15, p. 23-24; *T&C(-Lindenbergh)*, *Art. 6:162 BW* no. 5; *H.R.* 9th December

**299. Germany** That largely corresponds to the legal situation in Germany. The breach of contractual obligations represents as such neither a breach of an (absolute) right in the sense of § 823 (1), nor the breach of a protective law in the sense of § 823 (2) BGB. If the breach of a right named in § 823 (1), or of objects of legal protection (in particular property damage or bodily harm) comes in addition to the breach of contract, the principle of concurring claims applies involving contractual and tortious liability.<sup>1095</sup> An exception from this principle is made where the application of tort law would have to frustrate the purpose of a contract law norm, for example, because it provides for certain liability privileges or shorter limitation periods which would be without a practical scope of application, if at the same time tortious liability would come into play.<sup>1096</sup>

**300. Austria** In Austria also, between contractual and tortious claims, in principle concurring claims or concurring norm claims exist. In contrast to Germany, a shorter contractual limitation period even leaves the tortious claim of a property owner untouched.<sup>1097</sup> In particular the special limitation provisions in the third book of the Commercial Code (§§ 414, 423 and 439 HGB) are not applied to compensation claims for delicts if there is no agreement to the contrary. That is assumed if the consignor himself is the owner of the object which has been lost or damaged, because it is not to be recognized that the tortiously acting trader should be favoured, merely because he has a contractual relationship with the injured party.<sup>1098</sup>

**301. Greece** In Greece very similar questions to those in Germany and Austria are discussed. The case law states that breaches of contract represent a tort in the sense of art. 914 CC only if the damaging conduct is unlawful, even if no contract existed.<sup>1099</sup> In such cases the case law assumes from the principle of concurring claims: that contractual

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1955, NJ 1956, 157; H.R. 6th April 1990, NJ 1991, 689; H.R. 6th December 1996, NJ 1997, 398.

<sup>1095</sup> Continual case law, see BGH 28th April. 1953, BGHZ 9 p. 301, 302; BGH 24th May. 1976, BGHZ 66 p. 315, 319; BGH 17th March 1987, BGHZ 100 p. 190, 201; Erman (-*Schiemann*) BGB I<sup>10</sup>, Introduction to § 823, no. 25; Staudinger (-*Hager*), BGB<sup>13</sup>, Introduction to §§ 823 ff., no. 38.

<sup>1096</sup> See from comprehensive case law e.g. on § 521 BGB BGH 20th November 1984, BGHZ 93, p. 23; on § 599 BGB BGH 23rd March. 1966, BGHZ 46, p. 140, 145; on § 690 BGB BGH 23rd March 1966, NJW 1967, p. 42, 43; on § 708 BGB BGH 20th December 1966, BGHZ 46, p. 313, 316 (all cases concerning contract law provisions which require qualified fault); and on § 548 [§ 558 old version] BGB BGH 31st January 1967, BGHZ 47, p. 53, 55; BGH 24th May 1976, BGHZ 66, p. 315, 320; BGH 8th January 1986, NJW 1986, p. 1608 and on § 606 BGB BGH 31st January 1967, BGHZ 47, p. 53, 55 (shorter contract law limitation periods).

<sup>1097</sup> Further *Koziol*, Haftpflichtrecht I<sup>3</sup>, nos. 17/8 ff.; Rummel [-*Reischauer*] ABGB II<sup>2</sup> § 1295 no. 25.

<sup>1098</sup> *Chr. Huber*, Zur Verjährung des Schadenersatzanspruches gegen den Frachtführer, JBl 1986, 227; OGH 9th September 1986, JBl 1986, 793, note *Chr. Huber*; OGH 16th November 1989, JBl 1990, 528.

<sup>1099</sup> A.P. 967/1973 NoB 22/1974, p. 505; A.P. 1058/1977 NoB 26/1978, p. 929; CA Athens 10288/1986 EllDik 28/1987, p. 886.

and tortious liability can be asserted separately in accordance with their own rules.<sup>1100</sup> Only then, if individual provisions of contract law would be practically meaningless (for example, with the arrangement of a less strict liability standard, as in arts. 811 and 823 CC), an exception from the principle of concurring claims is made.<sup>1101</sup> Also from a limitation law point of view, contractual and tortious liability in principle follow their own respective rules.<sup>1102</sup> Only in the law of tenancy (art. 602 CC) are the tort law claims of the landlord in relation to the tenant, subject to the shorter contract law limitation.<sup>1103</sup> In the legal literature, moreover, the application of the short limitation for service contracts in respect of consequential damage caused by a defect (art. 693 CC) is also approved for a tort law claim,<sup>1104</sup> whilst the short limitation period for purchase contracts should not include tortious liability for consequential damage caused by a defect.<sup>1105</sup>

**302. Portugal** During the preparation of the Portuguese Civil Code of 1966, an explicit provision on the relationship between contractual and tortious liability was indeed considered,<sup>1106</sup> but not entered into the law. The concept of concurring claims may still be prevailing today, whereby the plaintiff can freely chose the liability regime which is more favourable to him, as long as the respective requirements are fulfilled.<sup>1107</sup> The exact opposite point of view is also represented, namely the “*princípio da consunção*” developed from the “*sistema do não cúmulo*” in favour of priority for contractual liability.<sup>1108</sup> Contractual and tortious liability are differentiated in a number of areas (limitation, burden of proof in respect of fault); the actual compensation law is, however, uniformly regulated in arts. 562-572 of the Portuguese CC. Generally it is said that the contract regime covers unsatisfactory or non-performance damage, whose general principles are regulated in arts. 798-800 CC. Thus the liability of a contractor in relation to a client for whom something is being built or to a purchaser, for losses as a consequence of a building defect is of a contractual nature (art. 1225), but the liability of the owner or possessor of the building in respect of third parties, is however tortious (art. 492 CC).<sup>1109</sup>

<sup>1100</sup> A.P. 171/1978 NoB 27/1979, p. 238; A.P. 967/1973 NoB 22/1974, p. 505; CA Athens 10288/1987 EllDik 28/1987, p. 886; CA Athens 5653/1987 EllDik 30/1989, p. 775.

<sup>1101</sup> CA Athens 951/1967 NoB 16/1968, p. 279.

<sup>1102</sup> A.P. 47/1996 NoB 46/1998, p. 206; A.P. 18/1993 NoB 41/1993, p. 1069; A.P. 967/1973 NoB 22/1974, p. 505.

<sup>1103</sup> CA Athens 6595/1994 EllDik 36/1995, p. 1288; CA Dodoni 261/1997 EllDik 39/1998, p. 185.

<sup>1104</sup> Georgiades/Stathopoulos (-Kardaras), Arts. 688-690, no. 30.

<sup>1105</sup> Georgiades/Stathopoulos (-Doris) Arts. 554-558, no. 18; cf. *Deliyannis-Kornilakis*, *Eidiko Enochiko Dikaio* I 260.

<sup>1106</sup> *Vaz Serra*, *Responsabilidade contratual e responsabilidade extracontratual*, *BolMinJus* 85 (1959) 238.

<sup>1107</sup> See amongst others *Antunes Varela*, *Obrigações em Geral* I<sup>10</sup> 637 and STJ 22nd October 1987, *BolMinJus* 370 (1987) 529.

<sup>1108</sup> *Almeida Costa*, *Obrigações*<sup>9</sup> (2001) 473 ff; STJ 9 February 1995, CJ(ST) III (1995-1) 75.

<sup>1109</sup> *Pires de Lima and Antunes Varela*, *Código Civil Anotado* II<sup>3</sup> 827, note 5 to Art. 1225.

303. **Sweden** In Sweden contractual and tortious liability likewise are in principle subject to free concurrence of actions, but tortious liability can as a rule not be asserted if it allows further-reaching legal remedies than the competing contractual liability and if from their interpretation, it results that they wish to replace the tortious liability. This can be the case, for example, where a claim in contract has lapsed,<sup>1110</sup> or where the contractual claim does not include the entire damage.<sup>1111</sup> If the tortfeasor is in possession of the object, an existing contractual relationship with the injured party can shift the burden of proof, for example in the case of safe-deposit contracts.<sup>1112</sup> If, on the other hand, contract law is more favourable to the injured party than tort law, he can rely without further ado on contract law. Examples of this are found in consumer law, for example. In particular § 31 of the Swedish consumer sales law and (the not totally congruent) chap. 5 § 21 in comparison with chap. 5 § 20 of the Finnish consumer protection law (*Konsumentskyddslag*)<sup>1113</sup> can be more favourable to the consumer than the transplanted EC Product Liability Directive. An instructive example for the approach of the Swedish courts is found in HD of 28th February 1996.<sup>1114</sup> The plaintiff, the owner of a kennel for dogs and cats, was injured by one of the animals staying there, which pulled so strongly on the lead that the plaintiff fell and sustained a broken bone. The court held the strict non-contractual liability for dogs as inapplicable, and was of the opinion that only contractual liability could come into question, and this was to be denied on the basis of a lack of fault.

304. **United Kingdom** Where there is a contract between the party claimed against and party seeking to establish the existence of a duty of care in tort/delict capable of giving rise to liability for negligence on the part of that other contracting party, that contract does not prevent the existence of such a duty of care. A case can, accordingly, be pled cumulatively or alternatively on the basis of breach of a duty of care in delict/tort, for instance in order to obtain the benefit of any advantage with respect to limitation of time for bringing an action.<sup>1115</sup> However, the existence of a contract between the parties will determine what range of matters are those in respect of which there is a duty of care in delict/tort; it is not possible to disregard the contract and establish a wider range of liability for negligence by reference to delict/tort. The “parties’ mutual obligations in tort/delict” are not capable of being “any greater than those to be found expressly or by necessary implication in their contract”.<sup>1116</sup> On the other hand, the existence of the contract between the parties may make clearer that a duty of care does exist in a situation in which, absent the contract, there would be doubt as to whether the relationship

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<sup>1110</sup> *Lindskog*, *Preskription*<sup>2</sup> (2002) 555-556.

<sup>1111</sup> Swedish HD 25th May 1949, NJA 1949 p. 289; Swedish HD 28th September 1951, NJA 1951 p. 656; *Hellner and Johansson*, *Skadeståndsrätt*<sup>6</sup> 90.

<sup>1112</sup> *Hellner and Johansson* loc. cit. 87.

<sup>1113</sup> Law of 20th January 1978/38.

<sup>1114</sup> NJA 1996 p. 104.

<sup>1115</sup> In particular *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145.

<sup>1116</sup> *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1986] A.C. 80 per Lord Scarman at 107, cited in the Scottish first instance decision, *Huges v Barratt Urban Construction (Scotland) Ltd* [2002] ScotCS87 per Lord Carloway at [19].

between the parties was one of appropriate interdependence. This has been little discussed. But, for instance, in one case recognising that a duty of care was capable of arising in tort in respect of psychiatric injury consequent on damage to the claimant's house caused through the negligence of a company installing central heating there, it was of significance that the plaintiff was in a contractual relationship with the defendants.<sup>1117</sup> The reason why the existence of a contract between the parties both does not prevent a duty of care in delict/tort for negligence from being capable of arising, and has relevance to its scope, is because the question as to whether a duty of care is or is not capable of arising in respect of negligence in delict/tort depends on establishing a background relationship of "proximity" between the parties, and a decision as to whether it is "fair, just and reasonable" in the light of that that a duty of care of the scope in question arises. In situations where there is a background context of contracts, not between the parties with each other, but between one or both of the parties and a third party or third parties, this does not of itself prevent a duty of care in delict/tort for negligence being capable of arising. Rather, the background of contracts, depending on the type of context, is a factor that can support the recognition of the situation being one in which a duty of care in delict/tort is capable of arising, or (much more frequently) can do the opposite. This is because in some contexts the contract(s) between the party or parties with third party(-ies) are taken as indicating that the parties are brought into a relationship of proximity with each other, whereas much more frequently, that is seen, by contrast, as showing that they are at arms length, and so not in the appropriate relationship of proximity such that it would be fair, just and reasonable for a duty of care in delict/tort to be recognised as arising. The question has been discussed in detail in the context of large construction projects where a party has sought to claim for loss caused by another party with whom it is not in a direct contractual relationship. It has, though also arisen in the context of complex financial transactions and has been of significance in the context of carriage of goods by sea. Specific examples in that context have been decisions that ship surveyors employed by a non-profit international maritime organisation have no duty of care to cargo owners,<sup>1118</sup> shipowners have no duty of care to buyers of cargo where the risk under the contract of sale has passed but not the right of ownership of the goods.<sup>1119</sup> A general example, which applies to moveable as well as immoveable property is that there is no duty of care to subsequent purchasers of property that is defective.<sup>1120</sup> The approach has been applied also in transactions involving a complex of parties in the finance industry.<sup>1121</sup> In the field of construction projects, where the question has been mostly discussed, the only prominent instance where the existence of a contract with a third party was held in the context to indicate rather than tend to negate the possibility of a duty of care being capable of arising in delict/tort for

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<sup>1117</sup> *Attia v British Gas plc* [1988] Q.B. 304 (CA) per Dillon L.J. at 312.

<sup>1118</sup> *Marc Rich & Co AG v Bship Rock Marine Co Ltd (The Nicholas H)* [1996] A.C. 211.

<sup>1119</sup> *Leigh and Sullivan v The Aliakmon Shipping Co (The Aliakmon)* [1986] A.C. 275.

<sup>1120</sup> *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2002] BLR 97 (CA) – a rule that it is not possible to consider generally a defect in one part of a structure as causing damage later to another.

<sup>1121</sup> See *Banque Financiere de la Cite SA v Westgate Insurance Co* [1991] 2 A.C. 249.

negligence was a House of Lords decision in the 1980s that a “nominated” sub-contractor in connection with a construction project, ie a sub-contractor whose contract was with the main contractor, not the person for whom the building was being built (the “employer”) but the choice of whom was approved by the architect for the employer, did have a duty of care to the employer in delict/tort in respect of negligently carrying out work in creating the flooring of the building.<sup>1122</sup> The decision attracted academic criticism and has not been extended by analogy.<sup>1123</sup> It is thought that it might be overruled. It has though, been relied on sporadically in some Scottish first instance decisions, for instance in holding that an architect who contracted with prospective tenants for the design of a building on land owned by the pursuers did have a duty of care in delict/tort in respect of the loss sustained by the pursuer who came to own the building as an accession to their land.<sup>1124</sup> On general principles, also, it may still be anyhow in unusual circumstances possible for a court to hold that there is a duty of care capable of arising on the part of a party with a contractual relationship with a third party. These would be situations where a wider range of factors point to the relationship being one of “proximity” and where it is “fair, just and reasonable” to recognised the duty. A rare example in recent years from the Court of Appeal in England<sup>1125</sup> was a recognition that a project management company in contract with a developer of land did have a duty of care to a prospective building contractor in respect of negligently informing it that if it tendered for the contract on a particular basis the building works would be in accordance with the planning permission granted by the public planning authority, which resulted in loss as the prospective contractor commenced work, as is not uncommon, before its contract with the developer was concluded, only to be required after a short while by the planning authority to stop work until planning permission was obtained. It is much more likely that the existence of contract(s) with third party(-ies) will be looked on as a factor strongly tending to negate the possibility of a duty of care arising in delict. This is seen as reflecting business expectations, which rely on the structure of contracts in such contexts as determining the disposition of risk, between the players involved in the project. Many instances that have been considered in connection with construction projects are ones where the claim was in respect of pure economic loss.<sup>1126</sup> But this has been so, too in several cases of physical damage arising in the course of the works in construction projects. Thus where sub-contractors, who were not “nominated”, negligently damaged the building works by fire no duty of care was held to be capable of arising in tort/delict on their part.<sup>1127</sup> (By contrast, owing to different provisions relating to which party had

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<sup>1122</sup> *Junior Books v Veitchi Co* 1982 SC (HL) 244.

<sup>1123</sup> *Muirhead v Industrial Tank Specialities* [1986] Q.B. 507 and many later cases.

<sup>1124</sup> *Norwich Union v Covell Matthew* compare with *Strathford East Kilbride Ltd v HLM Design Ltd*, 1999 SLT 121 where no duty of care was capable of arising to prospective tenants where the architect contracted with the owner of the building.

<sup>1125</sup> *J. Jarvis and Sons Ltd v Castle Wharf Development Ltd* [2001] EWCA Civ 19; (2001) 17 Const L J 430.

<sup>1126</sup> E.g. *Simaan General Contracting Co v Pilkington Glass Ltd* [1988] Q.B. 758.

<sup>1127</sup> *Norwich City Council v Harvey*; *Scottish Special Housing Association v Wimpey Contrcution (UK) Ltd*.

the obligation to insure, a duty of care in delict was held capable of arising where it was a “domestic” sub-contractor who caused the damage).<sup>1128</sup>

#### (4.) In particular: Liability in respect of Self-contained Damage in Defective Products and Buildings

**305. General** A much discussed particular case of the problem of the relationship between contractual and tortious liability concerns the question of the relevant regime in cases of the “self-destruction” of a product: This involves cases in which an object is delivered or produced whose defectiveness is first of all limited to part of the object, later, however, spreads to other parts or throughout the whole object. A complex object (for example, a big machine) is delivered with a defect but overall in tact (a switch which should turn off the machine in the case of overheating, does not work). Later the whole object, as a result of the defective part which was present from the beginning, is destroyed (the electricity circuit is not broken, the machine catches fire and is totally destroyed). The predominant European legal view today is to leave the liability for such, in the German case law so-called “*Weiterfresserschäden*” purely for the contractual regime. The EU Product Liability Directive excluded damage which develops itself in the defective product, from its area of application, art. 9 limb (b). This rule only applies, though, to strict liability under the Directive; the regime of the liability for negligence is likewise as little covered as the regime of contractual liability (art. 13). The Directive on the sale of consumer goods does not expressly comment on the problem. It leaves the existing national tort law orders untouched, though (art. 8).

**306. Germany** The German case law confirmed in cases of this type a tort law-relevant damage to property in respect of the remaining object (the machine without the defective switch), and therefore in this respect, with the application of the rule on concurring claims, granted a claim in tort law free from contract law boundaries (limitation; exemption clause limited to contractual liability).<sup>1129</sup> On the other hand, it does not involve damage to property (and consequently liability will arise exclusively in contract), if the damage asserted corresponds with the “lack of worth”, which stayed with the object as a consequence of its defectiveness from the beginning.<sup>1130</sup> The details of the borders are still in a state of flux. In the BGH judgment of the 12th December 2000<sup>1131</sup> it was assumed that there was no damage to property concerning a building (and consequently tort law was not applicable), if a piece of land laden with some quantities of slag is built upon by the purchaser and the building works are damaged by the later expansion of the slag. The buildings were never defect-free under the ownership of the plaintiff.

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<sup>1128</sup> *British Telecommunication plc v Thomson* 1999 SLT 224 (HL).

<sup>1129</sup> BGH 24th November 1976, BGHZ 67 p. 359.

<sup>1130</sup> BGH 18th January 1983, BGHZ 86 p. 256; BGH 12th February 1992, BGHZ 117 p. 183.

<sup>1131</sup> NJW 2001 p. 1346.

**307. Greece** In Greece the development in Germany has been followed attentively.<sup>1132</sup> Here the view is also represented that if a detachable part of an object is defective, and through it damages the whole object, the provisions on product liability can be applied.<sup>1133</sup> Case law on the problem appears up until now to be missing, though.

**308. Italy** The Italian CC differentiates in art. 1494 between direct damage caused by the defectiveness of the purchased object (para (1): lower value of the object, repair costs, lost profit etc.), and indirect damage caused by the above to other objects of legal protection of the purchaser (para (2): health, ownership etc.).<sup>1134</sup> The case of the self-destruction of a purchased object could belong to art. 1494 (1) CC,<sup>1135</sup> an explicitly contract law claim. The problem, though, is that the liability under art. 1494 (1) CC lapses after a very short period, as long as the provision is (which is disputed in the legal literature<sup>1136</sup>) interpreted as a guarantee norm (one year from the date of delivery, once the buyer has notified the defect within eight days from its discovery). In order to escape this short limitation, the courts have allowed concurring tortious liability. The principle of concurring claims also applies in sales law.<sup>1137</sup> Art. 1494 (1) corresponds for the area of contracts for services in art. 1668 CC. Whether the liability regulated in art. 1669 CC of an undertaking for the destruction and gross defect of work objects is of a contractual or non-contractual nature, has not been uniformly judged.<sup>1138</sup> The case law at least considers them non-contractual. This is because it exists in the interest of everyone.<sup>1139</sup> If the requirements of art. 1669 CC are not fulfilled, in line with the circumstances liability from tort (art. 2043 CC) can come into consideration.<sup>1140</sup>

**309. Austria** In Austria, on the other hand, *Weiterfresserschäden* are dealt with, as far as is clear, in the framework of the PHG,<sup>1141</sup> by product liability law.<sup>1142</sup> Following § 1 PHG, the producer of a defective component only has to make good for damage caused to the final product if the injured party purchased the component as an independent product.

<sup>1132</sup> *Pouliades*, Festschrift for Vavoukos, vol. II, 495, 498 ff.

<sup>1133</sup> *Deliyannis-Kornilakis*, *Eidiko Enochiko Dikaio* III 348.

<sup>1134</sup> The legal nature of liability from art. 1494 (2) CC is contested in legal literature. Partly it is presumed that it involves liability for the breach of protection obligations which supplement the handing-over obligation (*Castronovo*, *Problema e sistema nel danno da prodotti* (1979) 471).

<sup>1135</sup> Case law demonstrations by *Buonocore/Luminoso*, *Codice della vendita* (2001) art. 1494 § 6.

<sup>1136</sup> Further *Mengoni*, In tema di prescrizione della responsabilità del venditore per i danni derivanti dai vizi della cosa, *Riv. dir. comm.* 1953, II, 297 and *Castronovo* loc.cit. 434.

<sup>1137</sup> Cass. 28th July 1986, no. 4833, *Foro it.*, Rep., 1986, *Vendita*, n. 54; Cass. 5th February 1998, no. 1158.

<sup>1138</sup> For a contractual qualification *Castronovo* loc.cit. 486-487.

<sup>1139</sup> Cass. 26th May 2000, n. 6997, in *Rep.Giur.it.* 2000, voce *Appalto privato* n. 84; Cass. 7th January 2000, n. 81, *Giur. It.* 2000, I, 1, 977.

<sup>1140</sup> Cass. 23rd March 1977, n. 1136, in *Giur. It.* 1978, I, 316; Cass. 7th April 1999 n. 3338, *RGiur.it.* 2000, voce *Appalto privato* n. 85.

<sup>1141</sup> *Bundesgesetz* of 21st January 1988 on the liability for a defective product, *BGBI* 1988/99.

<sup>1142</sup> *Posch* in *Schwimann*, *ABGB VIII*<sup>2</sup> (1997) § 1 *ProdHaftG* no. 7 ff.

Whether or not this is the case is to be judged by the conceptions of the proper duty of care.<sup>1143</sup> The OGH expressly does not follow the German case law.<sup>1144</sup> The facts dealt with by tort law in German case law, in Austria constitute exclusively contract law.

**310. Spain** In Spain, also, liability in cases of this type remains solely in the contract law regime. The German way (tort law) has indeed been discussed in academic literature,<sup>1145</sup> but the view is not that it should be introduced in Spain. Spanish case law contains no corresponding decisions. Following the concept of the *Código Civil*, arts. 1486 (2) and 1591 CC form the starting point (liability for hidden product defects in sales law and services law). The sales law limitation period is six months from the delivery of the object (art. 1490 CC). However, there is a concurrence of claims between this claim and the general compensation claim for non-performance (arts. 1101 ff CC) according to Spanish law, and as a result the limitation period is extended to 15 years.<sup>1146</sup> For damage caused by a mistake in the construction of a building, art. 1591 CC as well as arts. 17 and 18 of the building regulations law<sup>1147</sup> are relevant. Art. 17 loc.cit. expressly leaves the contractual liability of those involved in the building untouched. It is interpreted as in sales law, that arts. 1101 ff CC also remain applicable in this part of a service contract.<sup>1148</sup>

**311. Portugal** Similar to the Italian and Spanish CCs, the Portuguese CC provides for a purchase (arts. 913-922) and service (arts. 1218-1226) liability regime for damage which results from hidden product defects. The liability is of a tortious nature, if it involves damage which exceeds the actual product defect.<sup>1149</sup> In one case, in which a defective gas container exploded after delivery to the purchaser, the Supreme Court granted a contract law claim for the damage to the gas container and through this enabled the applicability of the general twenty year limitation period from art. 309 CC. At the same time, however, it was recorded that the tortious claim lapsing after three years (art. 498 CC) from art. 509 (1) CC had come into consideration.<sup>1150</sup> The Supreme Court had already decided in this way in 1974.<sup>1151</sup>

**312. Belgium, France, Luxembourg** In Belgium, France and Luxembourg the seller's liability in respect of the customer for damage as a consequence of a hidden defect of a sold good (*vices cachés*) is organized in contract law following the principle of the *non-cumul des responsabilités*.<sup>1152</sup> The appropriate provisions are found in arts. 1641 ff CC. The

<sup>1143</sup> OGH 3rd February 1992, SZ 67/22: liability of the producer of a defective water hose for damage caused to the engine of a car purchased, turned down.

<sup>1144</sup> OGH 3rd February 1992 loc.cit.

<sup>1145</sup> *Cavanillas Múgica and Tapia Fernández*, La concurrencia de responsabilidad contractual y extracontractual. Tratamiento sustantivo y procesal (1992) 13.

<sup>1146</sup> T.S. 3rd February 1986, RAJ 1986 (1) p. 360, no. 409.

<sup>1147</sup> Act 38/99 of 5th November 1999 *de Ordenación de la Edificación*.

<sup>1148</sup> T.S. 9th February 1990, RAJ 1990 (1) p. 782, no. 674.

<sup>1149</sup> *Romano Martínez*, Direito das obrigações, Parte especial – contratos (2001) 130 and 441.

<sup>1150</sup> STJ 22nd April 1986, BolMinJus 356 (1986) 349.

<sup>1151</sup> STJ 29th October 1974, BolMinJus 240 (1974) 209.

<sup>1152</sup> Cass.civ. 13th November 1984, Bull. civ. 1984 I, no. 303 p. 258.

claim for compensation from art. 1645 CC extends to damage to the object itself and also to other objects of legal protection of the purchaser.<sup>1153</sup> If a third party has suffered damage as a result of a defect, the third party only has a claim in tort law.<sup>1154</sup> The contractual liability from art. 1645 CC requires knowledge of the defect on the part of the purchaser. However, the case law in France assumes irrebuttably, and the case law in Belgium rebuttably, the bad faith of a professional seller (the seller has to prove that he could not possibly have known of the defect).<sup>1155</sup> Art. 1645 of the Luxembourgian CC since 1985 has expressly treated the professional seller as being in bad faith. In all three countries the legal action has to be brought within a short period (*bref délai*), art. 1648 CC.

**313. The Netherlands** If a movable or immovable object does not correspond to the contract for purchase, the purchaser, following art. 7:21 of the Dutch BW has a variety of possibilities for legal remedy. Art. 7:22 BW states that these legal remedies are available to the purchaser without affecting other possible claims. Belonging to these are also contractual compensation claims due to non-performance (art. 6:74 BW) as well claims from tort law (art. 6:162 BW).<sup>1156</sup> In respect of the latter, in the Netherlands also the question is raised of whether tort law claims include damage to the defective product itself.<sup>1157</sup> From the point of view of the concurrence of actions, in this special situation contract law has priority; article 6:162 ff BW (tort) not being applicable, but rather exclusively article 6:74 ff. BW. Art. 6:162 ff. BW only being applicable if the conduct of a party represents a tort independent of the breach of contract.<sup>1158</sup> Damage to the defective product itself in the framework of consumer good sales is subject to art. 7:24 BW, whose para. (1) refers to the general rules on non-performance for compensation claims. Consequential damage from a defect in the sense of product liability is not covered by this provision.<sup>1159</sup>

**314. Sweden** In Sweden it appears that since HD 2nd April 1918<sup>1160</sup> tort law has been predominantly fallen back on in order to cope with the problem of the self-destruction of a product.<sup>1161</sup> Besides, following § 67 (1) 2 of the new sales law, compensation does not include damage to other objects other than the object purchased. Damage which has come into being through a sold object becoming a component of another object (so-called component damage), are in principle compensated following tortious product

<sup>1153</sup> See for France *Malaurie/Aynès/Gautier*, Contrats spéciaux<sup>14</sup>, no. 411 p. 293 and for Belgium CA Bruxelles 22 November 1991, RGAR 1993, 12237.

<sup>1154</sup> See for France *Malaurie/Aynès/Gautier* loc. cit. no. 421 p. 299 and for Belgium *Herbots/Pauwels/Degroote*, TPR 1997 p. 735 no. 111.

<sup>1155</sup> See for France Cass.civ. 19th January 1965, Bull. civ. 1965, I, no. 52 p. 59 and for Belgium a *Herbots a. o.* loc. cit. no. 103, p. 729.

<sup>1156</sup> Asser-*Hijma* 5-I, no. 380, p. 339.

<sup>1157</sup> Asser-*Hartkamp* 5-I, no. 475, p. 407 and no. 448, p. 389.

<sup>1158</sup> Asser-*Hijma* loc. cit. no. 442, p. 384-385.

<sup>1159</sup> Further Asser-*Hijma* loc. cit. no. 443 ff, p. 385 ff; T&C(-*Castermans*) art. 7:24 BW, nos. 1-3.

<sup>1160</sup> NJA 1918 p. 156.

<sup>1161</sup> *Hellner and Johansson*, Skadeståndsrätt<sup>6</sup> 311.

liability law. An exception applies if the sold object represents the dominating part of the final product. The details are highly controversial.<sup>1162</sup>

315. **United Kingdom** A proposition that where there was created a “complex structure”<sup>1163</sup> that was affected by the negligence of the defender in the creation of one aspect of it there could be a duty of care capable of arising in respect of that negligence resulting in an adverse effect on that other part has now been rejected in England.<sup>1164</sup> In Scotland there is a conflict of authority at first with respect to the proposition. This broad approach was applied in two cases.<sup>1165</sup> However, a recent case<sup>1166</sup> has rejected it as inconsistent with later developments in House of Lords English cases formulating the general approach to be adopted in determining whether a duty of care is capable of arising in delict/tort for negligence. Recent English decisions can be taken as being the law. These have limited the idea to a much narrower one covering only situations where the negligent party was responsible for creation of something in a distinct part of a property already in existence, in circumstances where he was not responsible also for the creation of the whole, or a larger part of that property. So, a case on the part of a subsequent purchaser of a building with a negligently constructed fire protection wall between two parts of it for damage from a fire succeeded with respect to damage to contents of the building but not for damage caused to the part of the building that the fire wall was designed to protect.<sup>1167</sup> An example was given that would be within the narrow rule, namely, of a negligent subcontractor whose sole function was to install electrical wiring in a building being built and as a result of whose negligence the other parts of the building were damaged by fire.<sup>1168</sup> It is recognised that the distinction between cases of this sort and others is a borderline question.<sup>1169</sup> It has been held, for example, that, though “close to the border”,<sup>1170</sup> this could not apply where a manufacturer of carbon dioxide negligently caused it to be contaminated with benzene, supplied it to another manufacturer who mixed it with a combination of water and a concentrate acquired from another supplier to produce an alcoholic drink. A duty of care was held not to be capable of arising in tort as the claim related to “the finished product”, and its diminution in value and consequential losses following later upon the need to recall it from market. The argument was rejected that the contaminated carbon dioxide could be seen as having damaged the concentrate with which it was mixed.

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<sup>1162</sup> Further *Hellner and Johansson* loc.cit. 322 and *Bloth*, *Produkthaftung in Schweden, Norwegen und Dänemark* (1993) 264.

<sup>1163</sup> *D & F Estates v Church Commissioners for England* [1989] A.C. 177 (HL) per Lord Bridge at 206.

<sup>1164</sup> *Murphy v Brentwood District Council* [1991] 1 A.C. 398 per Lord Bridge at 479.

<sup>1165</sup> *Macleod v Scottish Special Housing Association* 1990 SLT 749 per Lord Coulsfield at 751-752; *Parkhead Housing Association v Phoenix Preservation* 1990 SLT 812 per Lord Prosser at 817.

<sup>1166</sup> *Hughes v Barratt Urban Construction (Scotland) Ltd* [2002] Scot CS 87 per Lord Carloway.

<sup>1167</sup> *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2002] BLR 97 (CA).

<sup>1168</sup> *Council of Sutherland v Heyman* 154 CLR 424 (High Court of Australia) per Deane J approved in *Murphy v Brentwood* (supra) per Lord Keith at 467-468.

<sup>1169</sup> *Bacardi-Martín Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] 2 Lloyd's Rep 379 per Manze L.J. at [18].

<sup>1170</sup> *Ibid.*

#### IV. Interference with Contractual Rights\*

**316. Introduction** The question of whether a creditor may claim damages when a third party has ruined his case, was in Roman law and Roman legal theory generally answered in the negative, the rationale being that a claim is a legal situation between creditor and debtor, entirely without relevance to a third party.<sup>1171</sup> This Roman thinking to a large extent has influenced later theory and practice, nevertheless without it being fully accepted. It is certainly far removed from the establishment of a general rule of a claim being regarded as completely unrelated to a third party, in the sense that this party, without being liable, might cause the debtor's obligations not to be met. Neither is it possible to establish a general rule as to third party liability in all situations in which third party involvement has had significance for a debtor's non-fulfilment of his obligations. The relevant legal situation might be described as "floating" in most jurisdictions in Europe.

**317. Groups of cases covered** The questions raised are also diverse in a legal-political sense. We shall here examine various groups of these. In one category are those cases in which a third party has unfairly endeavoured to influence an existing contractual situation. Since the basic idea is that a third party is not bound by an agreement between two parties and consequently has no commitment relating to the agreement, there is the question of whether a third party should be liable for such actions at all. A second category comprises those cases in which a contractual agreement suffers as a result of a third party causing personal or material injury. Providing that liability for personal or material injury is present, the question then is whether liability on the part of the offender might include the party to the agreement suffering the loss. Hence, the problems discussed concern in part the question of whether a third party might be liable for not having respected or for having disregarded existing contractual agreements, and in part the question of whether a third party is liable to the party whose contractual interests have been affected as a result of his business partner having suffered liable damages. Generally, it can be said that liability in any circumstances depends on the reasons for liability, on causal relationships, and on the damage in question being not so remote and unexpected that, for these reasons, it would be irrelevant. The main concern is the question of which claims might be protected by the liability regulations, are to be considered as involving liability, nevertheless.

##### (1.) Third Party Influence on a Contractual Relationship by Unfair Actions

**318. Unfair activities** If a third party has engaged in an unfair activity which has affected a contractual relationship, a certain contributory negligence regarding a breach of contract is present on the part of the third party. This might indicate that the third party

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\* Authored by *Viggo Hagstrøm* (Oslo); sub-edited by *Christian von Bar*. Further aspects of this issue are discussed by *Wintgen* (infra nos. 625-664).

<sup>1171</sup> See *Zimmermann*, *The Law of Obligations* (1996) 1036 ff. See also *Ross*, *Virkelighed og gyldighed i retslæren* (1934) 298 ff.

should also be held liable for breach of contract. At the one extreme are those cases in which the third party's unfair actions have in fact prevented the carrying out of the contract by the debtor. A case in point is the illegal boycotting of a business with the intention of rendering it incapable of fulfilling its contractual obligations. Although the boycott would not be imposed in order to hurt the other contracting parties, liability would also be part of their losses if such losses could be expected. The other extreme comprises those cases in which the third party by persuasion etc. has endeavoured to influence the behaviour of a party to an agreement in such a way that the latter makes a decision to the detriment of the creditor.

In a European comparative investigation based on the so-called "factual approach" – in other words based on case studies – the following reported situations, with somewhat different rationales, are generally considered grounds for liability: "X, a diva, is engaged by P to sing at Covent Garden for a three-month season and not to sing anywhere else during that period. D, the manager of Drury Lane, persuades X on the first day of the engagement to come and sing for him instead. X is not worth suing for damages."<sup>1172</sup> Apart from the fact that this concerns a disloyal competitive action which alone might be reason for liability, the following statement appears to explain the situation: "These are the facts of *Lumley v Gore* (1853) 2 E & B 216, which established tort ... procuring breach of contract by direct persuasion ... and forms a significant qualification of the doctrine of privity, whereby a contract only confers rights and imposes duties between the parties thereto."<sup>1173</sup> Or as stated in the French report: «P. peut agir en responsabilité contre X. et contre D. pour complicité dans la violation de l'accord d'exclusivité. Il a des chances d'obtenir la condamnation de D. à condition de prouver que celui-ci connaissait l'accord passé avec X. lorsqu'il sollicité la diva.»<sup>1174</sup>

**319. Key argument in favour of liability** The key argument in favour of liability appears to be that the third party actively seeks to bring about a breach of contract, knowing of the existing contractual relationship. Given acceptance of this rationale, there is no reason to dwell on third party contributory negligence resulting in breach of contract: The legal political argument in respect of liability in cases of contributory negligence is that the third party by unfair action violated existing contractual relationships. However, such unfair action might be present even if the reasons for liability are not a contributing factor to the breach of contract.

**320. Third party liability if the party unduly misleads or causes the debtor to breach a contract**<sup>1175</sup> The condition for liability in respect of contributing to a breach of contract is that an unfair action has taken place. If a third party acts as an adviser, for instance, in

<sup>1172</sup> Koziol (ed.): *Unification of Tort Law: Wrongfulness* (1998) 5.

<sup>1173</sup> *Op. cit.* p. 46.

<sup>1174</sup> *Op. cit.* p. 61.

<sup>1175</sup> See on this topic generally *v. Bar*, *The Common European Law of Torts I*, paras. 260, 310, 416. See also *Hagstrøm: Obligasjonsrett* (2003) 817; *Gomard: Forholdet mellem erstatningsregler i og udenfor kontraktsforhold* (1958) 55 ff.

the capacity of a lawyer for a contractual party, and errs in the process of giving advice to his client, e. g. that he terminates a contract, the third party is not liable for his client's co-contractor. This is so even if he has acted negligently.<sup>1176</sup> Neither has the third party a general duty to ensure that his client or joint partner maintains his contractual obligations in respect of others.<sup>1177</sup> In essence, the typical condition for these cases, as has also been stated in respect of French law, is as follows: "Thus, it is clearly established that a third party to a contract may be liable in delict for inciting or otherwise contributing to a contractor's non-performance if, but only if, that third party was *aware* of the existence of the contract or, as the case may be, its incompatible term: while neither intention to cause harm to the party to the contract nor malice is required, mere negligence in failing to know of a contract or its term benefiting the plaintiff is not enough, for, as *Viney* observes, to impose liability on a person who merely *ought* to know of another's contractual obligations would be too harmful to the certainty of transactions and, indeed, economic activity more generally."<sup>1178</sup> Similar in Common Law, interference with contractual relationships, whether to induce a breach of contract, or to compel by direct use of pressure, a breach of contract, will be held tortious.<sup>1179</sup> The same approach is taken in Germany.<sup>1180</sup>

**321. Misleading information leading to breach of contract** Closely related to the previous item are those cases in which misleading information leading to breach of contract has taken place by disloyal competitive actions, in other words, by the violation of legal regulations against "actions contrary to good business practice". As it is the particular type of action, i. e. that it is contrary to good business practice, which is being struck, this can lead to completely legal actions, depending on the circumstances, such as, for instance, the termination of a contract or the refusal to renew a contract. In Common Law, interference with the running of an established business is covered by the tort of wrongful interference with trade or business, a tort first developed after the Second World War. A more recent example is the case of *Lonrho PLC v Fayed and Others*,<sup>1181</sup> where a new tort was applied to the relationship between two firms, one of which had, to the detriment of the other, deceived the Monopoly Commission. The tort of wrongful interference with trade or business clearly has tremendous potential for expansion; how far its scope will spread cannot be easily predicted. It is primarily directed at damage caused to the plaintiff intentionally and directly (mere reflex damages as in boycotts are not enough) by unlawful means. The position in Germany is similar; there too wrongfulness must be proved in instances involving interference with business. However, greater value is given in common law to bringing the "unlawful means" under precise

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<sup>1176</sup> *Hagstrøm*: Obligasjonsrett 817 f.

<sup>1177</sup> See, for instance, judgements by the Norwegian and Danish Supreme Courts in Rt. 1997, 1322 and UfR 1999, 1417 H respectively.

<sup>1178</sup> *Bell/Boyron/Whittaker*: Principles of French Law (1998) 370.

<sup>1179</sup> *v. Bar* 260.

<sup>1180</sup> BGH 9th July 1992, FamRZ 1992, 1401, BGH 19th October 1993, NJW 1994, 128. See further *v. Bar* 416.

<sup>1181</sup> [1989] 2 All ER 65.

control, often by actions in other traditional torts.<sup>1182</sup> Using the concept in French law of *concurrency déloyale*, the liability for damages is, in such situations, an effective means of disciplining the market.<sup>1183</sup>

**322. Firm rules missing** In this field where firm rules are not yet established in the various jurisdictions, one must expect disparity, which can hardly be helpful to business in the internal market.

If a business wants to open up a new market for itself abroad naturally it will advertise for new customers and frequently also new staff. That in turn may easily have an adverse impact on existing contractual agreements of those customers and employees with other (competitor) businesses. A business in this position therefore needs to know what is the threshold for these repercussions having relevance under the law of tort in the country in question. It appears also probable that a country that has for contractual agreements a relatively low level of protection under its law of delict (as for instance Germany, where liability exists in such a context only for intentionally caused harm or harm brought about through conduct that is *contra bonos mores*, and the United Kingdom, where in principle inducing a breach of contract is required) offers more ready access for foreign competition to the market than a country that in comparison has a clearly more marked protection for relative rights (as for instance France, see further below at section 625 ff).

So far as the addressees of our questionnaires responded at all to this problem, they informed us that poaching employees is common and should remain permissible so long as it is not undertaken by unfair means.

As a point of departure it is reasonable to assume, that when a business has been established, it constitutes a “legally protected interest”. Competitors might endeavour to drive it out by employing the ethical use of market mechanisms, such as competitive pricing and quality competition, product development, better service, etc. But they cannot drive the newcomer out by unethical actions that are contrary to the law. Unlawful market expulsion is not permitted. But as far as the regular exploitation of market mechanisms and the use of general economic freedom are concerned, one is normally within legal market expulsion. However, if less reputable means are employed, the threshold might be considered exceeded.

**323. Good business practice** What frequently characterises cases which would be considered as unethical competition is that they involve carefully planned, unexpected offensives against a business as a whole, for example, by efforts to take on an agency, to attract employees in key positions, or by the acquisition of a competitor’s entire list of clients all of whom, for instance, are strongly advised to change their co-contractor. In judging if an action is contrary to “good business practice”, it is significant if a competitor, without negotiation, is able to acquire the fruit of someone else’s labour. The rationale for the legal rules relating to the protection of business know-how and business

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<sup>1182</sup> *v. Bar* 313.

<sup>1183</sup> *Bell/Boyron/Whittaker: Principles of French Law*, 370.

secrets is that one should not reap what others have sown.<sup>1184</sup> If the current system allows a business person to exploit the results of a competitor or simply “to take advantage” of his efforts, this would be considered reason for liability damages. Consequently, clientele lists, knowledge of the actual deliverer of goods, or of licencees or other clients might be protected, since exploitation of such material would readily be considered unethical interference with contractual rights. If a contractual situation, especially of a confidential nature, had provided knowledge of somebody else’s business, a competitor could be considered liable for damages, as it would be considered unethical to exploit this knowledge in competition with the other party, even if the knowledge would have been legally attainable elsewhere.

**324. Illustrations** In the following some areas important for business shall be discussed, in order to illustrate the problems involved. At the present state it is very unclear whether the acts described will be regarded as a wrongful interference with business.

**325. Break-away cases, freedom of action by former employees** An important group of cases of interference with contractual rights are the so-called “break-away cases”, where former employees leave the company and establish a competitive business of their own. The regulations in respect of unethical competition would consequently imply restricted freedom of action,<sup>1185</sup> so that, according to the circumstances, it could be considered grounds for liability for damages if former employees, for instance, contact their previous employer’s clients in order to persuade them to change their contractual partner. The break-away cases are characterised by former employees entering into competitive operations and using knowledge of their previous employer’s business to engage in deliberate actions against him. Although, after some time, it could be considered that exploitation of the knowledge of competitors’ businesses by a former employee would no longer be considered unethical. However, competitive actions in such a situation could be considered contrary to good business practice for other reasons.

**326. Attempts to hire a competitor’s employees** The requirement for good business practice limiting the possibilities for attempting to hire a competitor’s employees is, in general, the rationale at least governing Nordic legal practice, evidenced by the Danish Supreme Court judgements in respect of competitors’ access to exploiting expertise (for instance, knowledge of industrial production or of business aspects of another company, such as its lists of clients) by employing key personnel from that company. Based on the important judgements mentioned in U 1975, p. 1049 H and U 1980, p. 717, a prohibition was placed on the acquisition of a competitor’s know-how by hiring his personnel. Hence, the provision does not apply to the hiring of former employees only. The first judgement concerned a product, supposedly developed with the assistance of staff from a competitive business, which resulted in considerable savings. The Court considered that the competitor had illegally obtained a time advantage, and damages were consequently awarded. This was followed up in a later judgement where no completed product actually existed, but where key personnel entered into competitive operations and, for instance,

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<sup>1184</sup> See *Munch*, Know how og arbejdskraftens frie bevægelighed, UfR 1981 B p. 45.

<sup>1185</sup> Cf. the Norwegian Supreme Court judgement reported in Rt. 1990, 607.

endeavoured to establish contact with the competitor's clients. The Court objected to this for a limited period.

**327. Change of agent or sole distributor** The regulations relating to unethical competition can also determine what should be considered acceptable behaviour in respect of a change of agent or sole distributor. Depending on the circumstances, it could be regarded as contrary to good business practice to take on an agency unless it is vacant and the relationship with the previous agent has been terminated. On the other hand, a distributor has the right to change the agent, albeit a prospective agent cannot commence such negotiations on his own initiative. However, a general rule can scarcely be established stipulating that it is contrary to good business practice for a business person receiving an offer from a firm about taking on the task of sole distributor which is possessed by someone else, to enter into negotiations with him about this.<sup>1186</sup>

**328. Attempts to take over others' clients** Efforts to force somebody out of the market by a competitor seeking to take over somebody else's clients can also be considered contrary to good business practice when this has taken place by means other than by the regular use of market mechanisms. An instance of this is where a competitor has made direct approaches to his opponent's clients suggesting that they change their business connections in his favour. Also more direct efforts towards a *general acquisition* of an already established company's clients can be considered contrary to legal practice and hence a case for liability.

## (2.) Loss of Business as a Result of the Co-contractor's Exposure to Material Damage or Personal Injury

**329. General** If the conditions regarding the duty of liability of the offender to the injured party are present, the question arises as to whether the liability could be extended to include losses which the injured party's co-contractor, for instance his creditor, has suffered as a result of the actual damage. The situation might, for instance, occur in a work situation where a key person in a company suffers personal injury, the employer has to operate without him, and consequently could suffer losses; or again where a company's industrial equipment is damaged, resulting in temporary layoffs of staff and associated salary losses. Such incidents of damage can occur in relation to a number of different types of contracts.

**330. Damage to property** The law of delicts grants compensation only to people who have suffered damage. In cases of physical damage, deprivation of a thing, and loss of use of this, it is usually the owner, because the detriment caused by the unlawful conduct usually affects him alone. Thus, in cases of damage to property, legal systems cannot proceed before establishing who is the owner of the property. However, none of the European legal systems limit claims to owners. A successful claim may also be brought by third parties where there is sufficient "proximity" between them and the thing damaged

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<sup>1186</sup> See, for instance, the Norwegian Supreme Court judgement in Rt. 1984, p. 248.

or inferred with. The drawback is that the requirements for sufficient proximity vary all over Europe, and further, there is no agreed definition of the type of damage for which the owner or possessor should be compensated.<sup>1187</sup> The controversy arises because some European jurisdictions consider that it suffices for a person with a mere contractual right to a thing to be entitled to a claim in tort vis-à-vis the third party tortfeasors, whereas others require a title in rem. One proponent of the second view is English common law.<sup>1188</sup>

**331. Entitlement to claim damages** With the rationale in the majority of European countries<sup>1189</sup> being that only the injured party can claim damages,<sup>1190</sup> a number of situations might require that restraint be exercised and that the number of those claiming damages be limited. In some cases, the interests of the creditor might be sufficiently looked after by the actual injured party, for instance, the debtor, being able to present his claims. For example, if a company suffers industrial losses leading to a general weakening of its financial situation and thereby the position of the creditor, the interest of the creditor will be protected by the debtor seeking to have his losses covered by the party causing the damage. However, in many cases, the actual injured party's possibility of having his losses covered might be insufficient for his co-contractor to avoid losses. For instance, if the power supply is cut off as a result of an action for which the electricity company is liable, the company suffers material losses as well as losses to its profits. However, these losses are not comparable with those suffered by subscribers as a result of the power failure. The latter loss cannot be compensated for unless it can be determined that the electricity company has contractual liability for the power disruption. Liability in respect of someone other than the actual injured party will often increase the total liability of the person causing the damage. This could lead to the liability becoming unclear and extensive (the so-called 'floodgate argument').<sup>1191</sup>

It is manifest that the burdens for a business arising from liability in law are the larger the more readily the legal system of a state on whose territory the activity in question (for example, excavation work) is undertaken recognises the claims of third parties in respect of pure economic losses that they have sustained. It seems likely that a foreign company, should it at all be aware of this risk, will enter such a market only hesitantly or will protect itself in advance with additional insurance (which in turn will give rise to extra costs). Comparable difficulties arise, for instance, in a country where a passenger carrier is liable in the case of an accident not only to those involved and the close relatives of the passengers, but also, for example, to their employers. A striking case in this respect would be an accident in

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<sup>1187</sup> *v. Bar* 39.

<sup>1188</sup> *v. Bar* 40.

<sup>1189</sup> See the comparative investigation in *Spier* (ed.): *The Limits of Expanding Liability*, The Hague 1998, p. 37 ff., based on a power failure.

<sup>1190</sup> See *Andersson*: *Trepartsrelationer i skadeståndsrätten* (1997) 19, *von Eyben/Nørgaard/Vagner*, *Lærebog i erstatningsret* (1995) 225, *Hagstrøm*: *Culpanormen* (1983) 51 ff., *Hellner*: *Skadeståndsrätt*<sup>5</sup> (1995) 362 ff. and in *SvJT* 1969, 332 ff.

<sup>1191</sup> See *Andersson*, *Trepartsrelationer i skadeståndsrätten*, 38 ff.

which several famous football players on board sustain injury. Under French law, but not under German law, this could give rise to additional liability on the part of the bus company to the club for which they play.

**332. Limitation mechanisms** The traditional limitation mechanisms, primarily the request for “proximity”, would not often provide the party causing the damage actual protection against unreasonably heavy liability. For instance, if the party causes damage which results in the interruption of the electricity supply to a heavily built-up area, it would be expected that a number of the subscribers by losing their electricity supply might suffer losses, which could be considerable, particularly in respect of businesses. Concern for the extent of the liability as well as the desire for simple legal rules could therefore seem to justify restrictive provisions regarding liability in respect of persons other than the immediately injured party. The “power supply”-cases in Europe can give general guidance in this field of the law. The question of liability for interruptions to power supplies as a result of damage to electric cables and gas pipes laid under ground has largely been resolved.<sup>1192</sup> The owner of the pipes or cables has a claim for damages for the repair costs. Further, someone who suffers damage to the physical integrity of a thing as a result of a power cut is – in most jurisdictions, but not in all – entitled to damages for the restoration costs and loss of earnings. Lost earnings due to a temporary interruption of business, however, are often regarded as a pure economic loss, and are often not compensatable at all, or if so, only under extra-delictual principles (see for example *Spartan Steel & Alloys Ltd. v Martin Co. Ltd.* [1973] 2 QB 27.)<sup>1193</sup>

**333. Groups of cases** In a number of cases, it is possible for the creditor to protect his interests by either contract provision or insurance.<sup>1194</sup> If the creditor has not secured his interests in this way, it is not immediately given that he could depend on the party who has caused the damage. It could be maintained that the one who has a contractual relationship, in which breach of contract does not involve liability or insurance, cover can not expect economic compensation. It is nonetheless difficult to give a general reason for completely excluding claims by the co-contractor of the injured party;<sup>1195</sup> hence such claims might be met to a limited degree. As this area is presently undergoing modification, the legal situation is not clear. The following might provide some indications, not necessarily inconclusive.

**334. Damage to an item of the debtor in which the creditor has a direct interest** As a consequence of the delict provisions, protection against damage to, and destruction of, items is generally considered a protection not only for the owner, but also for others having a right relating directly to the damaged item such as, for instance, lienholders. A

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<sup>1192</sup> See *v. Bar* 32.

<sup>1193</sup> See *Spier* op. cit. s. 46 “The real reasons for the restrictive approach would seem to rest in a combination of (a) a fear of excessive liability and (b) a perceived need for an easily applied test leading to a predictable result.” For further discussion, see *Andersson*, *Trepartsrelationer i skadeståndsrätten*, 43 ff.

<sup>1194</sup> See *Andersson*, *Trepartsrelationer i skadeståndsrätten*, 58 ff.

<sup>1195</sup> So also according to *Hellner*: *Skadeståndsrätt*<sup>5</sup>, 363.

liability claim from someone other than the immediately injured party would not necessarily increase the injuring party's total liability. When an item is mortgaged, the economic interest in the item is divided between the mortgagee and the owner. If the secured claim exceeds the value of the item, the owner would normally not suffer economic losses; and the lienholder's loss resulting from the damage would be limited to the value of the item. Put in another way, a claim for damages on the part of someone other than the immediately injured party would, in such circumstances, become a question of the economic value of the item. Beyond the regard for simplified economic settlements, which could partly be looked after by the rules of authority, major objections can not be raised against the creditor claiming damages.

**335. "Obligatory" rights** However, reasons in favour of a right to compensation for parties other than the owner are not limited to lienholders, but are relevant also in respect of, for instance, the purchaser of the item concerned.<sup>1196</sup> Many at times would have wished to make an exception concerning the party whose right to the item is not of a material but rather of an "obligatory" nature. This party has never been recognised as having a separate liability claim. A closer explanation of what is meant by "obligatory" has not been provided. The situation which most readily comes to mind is that of a buyer or a hirer who is awaiting the delivery of chattels or has not started to use property (or has not had his ownership registered). No acceptable reason has been given for obligatory rights generally to have weaker liability protection. In conflict of laws situations and risk of injury cases, widely different considerations are involved. Rules regarding conflict of laws situations regulate dynamic protection, i. e. where several parties claim a right to an item, whereas rules regarding liability, on the other hand, are meant to protect against damage to one's interests and rights of ownership, what one might call "static protection".<sup>1197</sup>

**336. Common Law** However, as mentioned above, many jurisdictions require a title in rem. In two recent decisions by the House of Lords, *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd*.<sup>1198</sup> and *Leigh and Silavan Ltd. v Aliakmon Shippin Co. Ltd*<sup>1199</sup> it was held that "an obligatory control mechanism was imposed by the long established rule that in the case of physical damage to property .... the law does not recognise a claim in negligence by a person whose only right in relation to the property was contractual. If he is to recover for any injury which he had suffered he must have had either the legal ownership of, or possessory title to, the property concerned."<sup>1200</sup>

**337. Other jurisdictions** In other jurisdictions, a liability claim could presumably be acknowledged in respect of anyone who has a right relating to the destroyed or damaged

<sup>1196</sup> The question regarding the situation of the purchaser is discussed in *Hagstrøm: Obligasjonsrett.*, 827 ff. and in *Andersson, Trepartsrelasjoner i skadeståndsrätten*, 145 ff.

<sup>1197</sup> *Andersson* loc.cit. 147 f.

<sup>1198</sup> [1986] A.C. 1.

<sup>1199</sup> [1986] A.C. 785.

<sup>1200</sup> Slade L.J. in *Banque Keyser Ullmann SA v. Skandia (UK) Insurance Co. Ltd. And Others* [1990] 1 Q.B. 665, 792. See *v. Bar* 40.

item, regardless of whether the right is considered obligatory or material. At least, such rules should be put forward concerning the total or partial right to the use of property, for instance, the right in respect of lease. However, the consequence of this would be that the injuring party's liability could be greater than the value of the item he has damaged. This might, for example, be the case if A operates a business in rented premises, and B intentionally or unintentionally is guilty of setting the premises on fire, and B has to pay damages for A's losses as well as for those of the owner of the premises. There is scarcely reason for dealing with the total use of chattels differently, whereas the partial use of chattels has much in common with the cases to be discussed below so that they should be dealt with in similar ways.<sup>1201</sup> Danish Supreme Court U 1958 p. 73 H concerning an illegal confiscation of some gambling machines which did not belong to the restaurant owner in whose premises they were placed, seems to lead in this direction.<sup>1202</sup>

**338. Direct damage to the creditor** Contrary to the situations mentioned above where the damage has struck a specific item, injuries referred to in this section refer to damage to an instrument or a tool, the performance of which has been contracted. Concern regarding the extent of the liability could here, as mentioned, justify that a liability claim would not lead to damages. In the following, this is examined more in accordance with casuistic law.<sup>1203</sup>

**339. Employment contracts** Both employer and employee may suffer indirect losses as a result of injury caused by a third party. A Norwegian Supreme Court judgement could be a case in point:<sup>1204</sup> The case concerned a situation in which the employee suffered an injury. A taxi was hit by another vehicle that was entirely responsible for the damage, with liability on the part of the insurance company with which the vehicle was insured. The taxi was owned by a woman who did not operate it herself, but had employed a driver on a small weekly wage in addition to an agreed commission based on mileage. The taxi spent 12 days in a repair shop. Without any problems arising, *the owner of the taxi* received damages from the injuring party's vehicle insurance company, including compensation for lost profits. On the other hand, the insurance company refused to compensate *the driver* for loss of income. The company was supported in a Supreme Court decision (dissenting opinion 4-1). This judgement is similar to that of *Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd.*<sup>1205</sup> The actual need for limiting the definition in this area is unavoidable if the regulation in respect of obligatory rights does not provide liability protection and is rejected on account of it being an untenable criterion.<sup>1206</sup> The concerns mentioned in reference to power disruption etc. are also present when the company of an employer has been damaged, resulting in the termination of operations and in lay-offs.<sup>1207</sup> A different concern is that both capital and

<sup>1201</sup> See *Hellner*, SvJT 1969, 348 f.

<sup>1202</sup> *von Eyben/Nørsgaard/Vagner*, Lærebog i erstatningsret, 227.

<sup>1203</sup> See also *Bertil Bengtsson*, TfR 1988, 235 f.

<sup>1204</sup> Rt. 1940, 424.

<sup>1205</sup> [1986] A.C. 1.

<sup>1206</sup> *Hagstrøm*, Obligasjonsrett 832.

<sup>1207</sup> *Hellner*, Skadeståndsrätt 365.

work are interests worthy of protection, and that the social discrepancy between the two interests should not lead to employers having an inferior liability protection.<sup>1208</sup>

**340. Personal injury to an employee** A parallel, though not entirely identical, problem is the question of whether or not an employer could claim damages from an injuring party who has caused personal injury to an employee. Admittedly, claims for damages by the injured party's employer would scarcely imply an unexpected and, under unfavourable circumstances, devastating liability. But a claim for damages, for instance, for loss resulting from the closing down of operations or claims due to breach of contract on the part of co-contractors, would definitely depend on the particular circumstances of the employer's business and on the way he has structured his operations, and hence could easily be considered inadequate. Whether requests for damages beyond those of sickness benefits etc. should be precluded, is debatable. It could be maintained that the right to compensation in the form of sickness benefits – which are usually based on subrogation – is generally considered a better alternative than an individual assessment of damages.<sup>1209</sup> In particular, it should also be mentioned that “protection in respect of the human body should entirely belong to the individual person ... Awarding someone the economic interest in another person is incompatible with current social thinking; considering a human as equivalent to assets which could be exploited would not appeal to civilised people defending humane ideas”. Presumably, the best reasons favour the precluding of requests for compensation beyond those of sickness benefits etc., unless on rare occasions the employed could almost be equated with an investment or an industry, football players, for instance.<sup>1210</sup> With the increasing commercialisation of sports, injury to a major football player could be expected to cause the club losses far beyond those of salary expenses, and if death is involved, this could involve huge losses to the club during a transition period.

**341. Injury to debtors other than employees** Apart from in employment contracts, an injury to a debtor could involve losses on the part of the creditor, particularly if the debtor's payment ability is doubtful. Imagine, for instance, that the debtor's debts exceed the value of his assets, but that he has an impressive salary and consequently would be considered capable of fulfilling his obligations. Then, as a result of an injury committed by a third party, he becomes unable to work, either permanently or for an extended period of time. In such cases, he would often be able to claim damages from the third party. Consequently, providing his creditors with a direct claim against the third party would be unnecessary and would furthermore serve to complicate the economic settlement between the debtor and the third party. And if the debtor himself does not have a liability claim, the reasons for exempting the third party from liability in respect of the debtor might be of such a nature that this could scarcely be a question of liability to his creditors. Several reasons, therefore, are in favour of denying creditors liability in such a situation.

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<sup>1208</sup> See *Andersson*, *Trepartsrelationer i skadeståndsrätten*, 221.

<sup>1209</sup> According to *Jan Helner*, *SvJT* 1969, 341 f.

<sup>1210</sup> *Andersson* loc.cit. 162.

342. **Material damage to tools or equipment necessary for the injured party's performance to the creditor** These cases differ, but they have the common element of the debtor requiring the item as an instrument or tool for fulfilling his obligations, and of where damage to the item would lead to a breach of contractual obligations. The creditor's "actual and obvious interest" in the item could, depending on the circumstances, lead to him claiming damages from the injuring party when his contractual interests are harmed.<sup>1211</sup> A definition such as this ("*an actual and obvious interest*") would presumably imply that responsibility is present primarily in cases where creditor interest is an element of the basis for liability. If, for instance a repair shop is damaged, making it unable to complete assignments, the damage is not considered reason for the repair shop being liable in respect of its clients.<sup>1212</sup> According to this, it would not be easy for a client to have an independent interest sufficient for giving reason to claim compensatory damages from the injuring party. Many jurisdictions though, would not – as pointed out above – accept such a view.

## V. Liability Issues in Specific Contexts

### (1.) Pre-contractual Liability

343. **Introduction** The liability for "fault at the conclusion of a contract" (*culpa in contrahendo*) is perhaps the most well-known example of a legal concept oscillating between contract and tort law. Its consignment to one of these two columns of liability law was disputed from the beginning, and has remained so until today. Liability from *culpa in contrahendo* is "non-contractual" in as far as it requires contractual dealings but not the existence of a contract between the debtor and obligee. The liability is "contractual" or at least similar to contractual, on the other hand, not only because it partly generates obligations which in content can scarcely be differentiated from those which apply between "real" contracting partners, but also because another part of these obligations has the aim of facilitating contractual dealings. On this last aspect PECL arts. 2:301 (Negotiations Contrary to Good Faith) and 2:302 (Breach of Confidence) provide details. The European Court of Justice, on the other hand, decided in a decision from the 17th September 2002, that liability for damage from a bad-faith termination of contractual negotiations is, under international jurisdiction law, subject to art. 5 no. 3 of the Brussels Convention. It deals with a tort or an act which is equal to a tort.<sup>1213</sup>

344. **Germany** The theory developed as early as 1861 by *Rudolph von Ihering* of *culpa in contrahendo* took German law as its starting point, where since 2002 it has been integrated as a general legal concept into the legal framework of German contract law (§ 311

<sup>1211</sup> Cf. Norwegian Supreme Court judgement, reported in Rt. 1955 p. 872.

<sup>1212</sup> *Andersson* loc.cit. 207.

<sup>1213</sup> ECJ 17th September 2002, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH*, C-334/00, EuZW 2002, 655 = IPRax 2003, 143 with critical notes by *Mankowski*, Die Qualifikation der culpa in contrahendo. Nagelprobe für den Vertragsbegriff des europäischen IZPR und IPR, IPRax 2003, 127-135.

(2) and (3) BGB). It was, however, qualified as “non-contractual” shortly before this by a few courts.<sup>1214</sup> The BGB recognized from the beginning a number of non-tort law compensation provisions for reliance interest in the run-up to a contract (§§ 122 [reliance on a not serious or disputed declaration of intention], 179 [reliance on a non-existing power of attorney], 307 and 309 (old version) [reliance on the initial possibility of performance], 663 [non-disclosure of the refusal of an application following an offer to agency businesses]. Later on these were joined by the already referred to provision of § 611a (2) BGB (discrimination by an employer due to gender). From these individual bases of claims, case law and academia have derived the principle that from the starting of contractual negotiations or equivalent business contact, a reliance relationship similar to a contract exists which obliges the partners to the care of “debtors”.<sup>1215</sup> This principle is now found in § 311 (2) and (3) BGB. Claims from *culpa in contrahendo* are independent of the later existence of a valid contract. Following § 311 (3) BGB they come into consideration even against persons who did not wish to become contracting parties, but who in the negotiations allow, to a particular degree, confidence to be placed upon them and influence the negotiations. The law refers to § 241 (2) BGB, whereby the obligation relationship, following its contents, can oblige each party to consider the rights, objects of legal protection and interests of the other party (collateral and protection obligations). These obligations can be focused above all on clearing up misunderstandings, information, care or welfare.<sup>1216</sup> If these are breached, liability from § 280 (1) BGB is the consequence. The debtor must cover for the breach of the obligation, for which the scale of liability principally arises from § 276 BGB.<sup>1217</sup> In addition to his own fault, the debtor, in accordance with § 278 BGB also has to cover for his assistants in performance.<sup>1218</sup> The liability from *culpa in contrahendo* can only be excluded in general terms of business within narrow limitations (§§ 307 (2) no. 2 and 309 no. 7 BGB).<sup>1219</sup> As a rule the so-called breach of reliance is to be compensated for.<sup>1220</sup> If a contract has come into existence as a consequence of the obligation-breaching conduct of the other party, the injured party has a claim to annul the contract.<sup>1221</sup> If the injured party would have concluded a contract with another party, if it were not for the culpable conduct of the debtor, the lost profit from this contract also belongs to the negative interest.<sup>1222</sup> For the limitation of a *culpa in contrahendo* claim, the already mentioned §§ 195, 199 BGB, apply.

**345. Groups of cases** In the framework of liability from *culpa in contrahendo* what essentially is involved is (i) bodily harm and property damage, (ii) the non-coming into

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<sup>1214</sup> CA Frankfurt 15th August 2001, WM 2002, 1219, 1223.

<sup>1215</sup> RG 24th September 1918, RGZ 95, 58; BGH 20th June 1952, BGHZ 6, 330, 333; BGH 28th January 1976, BGHZ 66, 51, 54.

<sup>1216</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 311, no. 21.

<sup>1217</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 311, no. 22.

<sup>1218</sup> BGH 8th June 1978, BGHZ 72, 92, 97; BGH 15 June 1988, BGHZ 104, 392, 397.

<sup>1219</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 311, no. 23.

<sup>1220</sup> BGH 14th March 1991, BGHZ 114, 87, 94; BGH 6 April 2001, NJW 2001, 2875.

<sup>1221</sup> Palandt-Heinrichs, BGB<sup>62</sup>, § 311, no. 57.

<sup>1222</sup> BGH 2nd March 1988, NJW 1988, 2234, 2236.

being of contracts, as well as (iii) the determination of the conclusion of a contract with detrimental obligations. The most common clashes with tortious liability appear in the first group (example: a customer is injured by a falling roll of linoleum through the fault of an employee;<sup>1223</sup> a female customer and her child slip over on a vegetable in a supermarket;<sup>1224</sup> a car to be sold is damaged by someone interested in purchasing it during a test-drive.)<sup>1225</sup> Of great practical significance today is *culpa in contrahendo* in terms of coping with liability for culpable defective investment advice. Personal liability of the consulter namely requires that he “has a considerable economic interest of his own, or takes up, to a certain extent, personal confidence”<sup>1226</sup> in the contract to be concluded.

**346. Greece** The Greek legislature regulated liability for fault in contractual negotiations in arts. 197-198 CC. The purpose of these general clauses, so it is said, exists in the creation of healthy relations in business dealings through the recognition of loyalty and good faith as a leading principle not only in the framework of contracts, but also as early as the pre-contractual arena.<sup>1227</sup> A pre-contractual obligation relationship can also exist, for example, if someone enters a shop and looks at the displayed goods, or looks for a seat in a restaurant.<sup>1228</sup> The well-known cases in German law of safety defects in shopping centres (“the vegetable case”), do not, however, belong in Greek understanding to *culpa in contrahendo*, because they have no inner connection to the object of the contractual negotiations. The law of *culpa in contrahendo* only has the task of protecting justified reliance on the coming into existence of contracts, consequently allowing honesty to rule in the arena of negotiations.<sup>1229</sup> It involves, for example, the causing of the voidness of a contract,<sup>1230</sup> the unjustified breaking off of negotiations<sup>1231</sup> and bad faith exertions of influence on the forming of a contract.<sup>1232</sup> The legal nature of liability from culpa in

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<sup>1223</sup> RG 7th December 1911, RGZ 78, 239, 240 f.

<sup>1224</sup> BGH 28th January 1976, BGHZ 66, 51, 54.

<sup>1225</sup> BGH NJW 1968, 1473.

<sup>1226</sup> CA Frankfurt 15th August 2001, WM 2002, 1219; BGH NJW 1991, 1241; continual case law. See most recently again BGH 13th June 2002, IHR 2003, 50 (on the liability of a negotiations assistant in the conclusion of a contract, which as a result of the negotiations led by the assistant did not point out to the person carrying out the task, that the mandator (as a limited co. with headquarters distributed within the country), is in Hungarian law a company exclusively with headquarters in Hungary, which was only put across). Instructive overview by Schwab, Grundfälle zur culpa in contrahendo, Sachwalterhaftung und Vertrag mit Schutzwirkung für Dritte nach neuem Schuldrecht, JuS 2002, 773-778.

<sup>1227</sup> Schedion Astikou Kodikos, Genikai Archai, 216 ff. On the term of this “negotiations arena” see further CA Athens 1536/1966, NoB 14/1966, 884 and Poulidis, Culpa in contrahendo und Schutz Dritter, 163.

<sup>1228</sup> ErmAK-Koumantos, Art. 197-198, no. 43.

<sup>1229</sup> Poulidis loc.cit. 165.

<sup>1230</sup> CFI Heraklion 508/1953 NoB 2/1954, 502.

<sup>1231</sup> CA Athens 2589/1968, NoB 17/1969, 429.

<sup>1232</sup> CFI Thessaloniki 1465/1966, Arm. 21, 38.

contrahendo is highly controversial. It is qualified by some as tort law,<sup>1233</sup> by some as a part of contract law<sup>1234</sup> and by some as an independent type of liability.<sup>1235</sup> It is a discussion which is in particular concerned with the question of recoverability of pure economic loss.

**347. Italy** Art. 1337 of the Italian CC determines that the parties have to conduct themselves following the values of loyalty and good faith in the taking part in negotiations and the setting-up of a contract. Art. 1337 CC pursues the purpose of preventing the dishonest breaking-off of contractual negotiations, the conclusion of a non-binding contract and the conclusion of a binding contract which is unreasonably interfered with to the detriment of the affected party.<sup>1236</sup> The legal nature of this liability is also controversial in Italy. The case law qualifies it as a particular part of tort law,<sup>1237</sup> and so does a considerable part of the legal literature,<sup>1238</sup> which also makes proposals though, and at times talks of qualifying it as contract law. In principle only a so-called reliance interest (negative interest) is compensated for.<sup>1239</sup>

**348. Portugal** Art. 227 (1) of the Portuguese CC regulates liability from *culpa in contrahendo* as follows: “A person who deals with another with regard to concluding a contract has to respect the rules of loyalty and good faith in the preparation as well as with its adoption; otherwise he is liable for the damage culpably caused to the other party.” In Portuguese law the criteria of *boa fé* is emphasized as the central idea of the liability from *culpa in contrahendo* and the reliance of the negotiating parties in the coming into being of a contract is principally held as being worthy of protecting. So-called negative interest is also compensatable here; it includes losses suffered and lost profit (art. 564 CC).<sup>1240</sup> Art. 227 CC concerns at least two basic situations, namely the conclusion of a binding contract and the breaking off of negotiations. The Portuguese case law does not, however, hold culpa in contrahendo as being applicable to the breach of protection obligations (*deveres de protecção*). It limits it much more to obligations of “honesty” (*deveres de honestidade*)<sup>1241</sup> and to correct information (*deveres de informação*).<sup>1242</sup> There is a lack of unity when it comes to the legal nature of pre-contractual liability. It is mostly qualified as contractual with reference to art. 798 CC; however, the opinion is represented that it is of a non-contractual nature, or it is said it represents a

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<sup>1233</sup> ErmAK-Koumantos, Art. 197-198, no. 9.

<sup>1234</sup> Poulidis loc.cit. 201.

<sup>1235</sup> Georgiades/Stathopoulos, Art. 197-198, nos. 1 and 10.

<sup>1236</sup> *Roppo*, Il contratto (2001) 180.

<sup>1237</sup> Cass. 29th April 1999, n. 4299, Giur. it. 2000, I, 1, 932; Cass.sez.un. 16th July 2001, n. 9645, Foro it. 2002, I, 806; Cass. 4th March 2002, n. 3103, Giust. civ. Mass. 2002, 382.

<sup>1238</sup> Bianca, Diritto civile, 3, Il contratto (1998), 163; Sacco and De Nova, Il contratto, II (1999), 255.

<sup>1239</sup> Cass. 14th February 2000, n. 1632, Giur. it. 2000, I, 1, 2250.

<sup>1240</sup> CA Lisbon 8th July 2001, CJ XXVI (2001-4) p. 77, 83; STJ 10th May 2001 CJ(ST) IX (2001-2) p. 71; Vaz Serra, Culpa do devedor ou do agente, BolMinJus 68 (1957) 133.

<sup>1241</sup> STJ 5th February 1981, RLJ 116 (1983) 81.

<sup>1242</sup> STJ 14th October 1986, BolMinJus 360 (1986) 583.

“*terceira via*” of civil law liability.<sup>1243</sup> The case law shows a tendency to label it as contractual,<sup>1244</sup> but does not always make a definite decision.<sup>1245</sup> Following art. 227 (2) CC, however, a claim from pre-contractual liability expressly lapses in accordance with the limitation rules of tort law (art. 498 CC).

**349. Spain** In the Spanish Civil Code a provision on the liability for *culpa in contrahendo* is not present, but the concept is quite well known.<sup>1246</sup> The legal literature is conscious of the (outside of Spain) wide-spread thesis of the contractual nature of *culpa in contrahendo*<sup>1247</sup>, but as a rule does not follow it, however: liability from *culpa in contrahendo* is either qualified as non-contractual<sup>1248</sup> or as *sui generis*.<sup>1249</sup> Liability for the breach of protection obligations (injury to the body and damage to the property of the other contracting partner) is reserved for tort law.<sup>1250</sup> In the case law of the *Tribunal Supremo*, cases are found which ground pre-contractual liability on the principle of loyalty and good faith.<sup>1251</sup> Other decisions ground liability for a bad faith breaking off of negotiations, on the other hand, in tort law (art. 1902 CC).<sup>1252</sup> The employment law senate of the *Tribunal supremo*, however, a few years ago classified pre-contractual liability as being contractual.<sup>1253</sup> Pre-contractual liability, moreover, also addresses itself in Spain to the compensation of negative interest, i. e. breach of reliance (*interés de la confianza*).<sup>1254</sup> It includes loss suffered<sup>1255</sup> and in the opinion of some authors, also lost profit.<sup>1256</sup>

**350. Austria** In Austria also, the commencing of contractual contact establishes two-sided rights and obligations. This liability from *culpa in contrahendo* follows contractual

<sup>1243</sup> Further *Menezes Leitão*, *Obrigações I*, 360 and *Prata*, *Notas sobre responsabilidade pré-contratual*, 198.

<sup>1244</sup> STJ 4th July 1991, *BolMinJus* 409 (1991) 743; STJ 3rd October 1981, *BolMinJus* 410 (1991) 754.

<sup>1245</sup> STJ 14th October 1986, *BolMinJus* 360 (1986) 583.

<sup>1246</sup> *Lacruz Berdejo*, *Elementos de Derecho Civil*, vol. 2: *Derecho de Obligaciones*, part 1: *Parte General. Teoría General del Contrato*. (1999) 385, *Díez-Picazo*, *Fundamentos del Derecho Civil Patrimonial*. Vol. 1: *Introducción. Teoría del contrato*<sup>4</sup> (1993) 271.

<sup>1247</sup> *Díez-Picazo*, loc.cit. 274, *Lete del Río*, *Derecho de Obligaciones*, vol. 2: *El contrato en general. Cuasicontratos. Enriquecimiento sin causa. Responsabilidad Extracontractual*<sup>3</sup> (1998) 78, *Lacruz Berdejo*, loc.cit. 386; *Carrasco Perera* in *Comentarios al Código Civil y Compilaciones Forales* (ed. by *Albadalejo*), vol. 15, part 1 (1989) 429.

<sup>1248</sup> *Carrasco Perera* loc.cit.

<sup>1249</sup> *Díez-Picazo*, loc.cit. 275.

<sup>1250</sup> *Díez-Picazo*, loc.cit. 277.

<sup>1251</sup> T.S. 5th April 1999, *RAJ* 1999 (1) p. 2910, no. 1873 oder T.S. 26th February 1994, *RAJ* 1994 (1) p. 1601, no. 1198.

<sup>1252</sup> T.S. 16th May 1988, *RAJ* 1988 (3) p. 4215, no. 4308 oder T.S. 16th December 1999, *RAJ* 1999 (5) p. 14130, no. 8978.

<sup>1253</sup> T.S. (6th Senate) 30th October 1988, *RAJ* 1988 (5), p. 7955, no. 8183.

<sup>1254</sup> T.S. 16th December 1999, *RAJ* 1999 (5) p. 14130, no. 8978.

<sup>1255</sup> *Díez-Picazo*, loc.cit. 280.

<sup>1256</sup> *Lete del Río*, loc.cit. 78.

principles.<sup>1257</sup> In addition tortious liability enters the equation, but it is without practical relevance because liability from *culpa in contrahendo* is more favourable for the injured party. This applies in particular for the liability for assistants (§ 1313a ABGB) and the distribution of the burden of proof (§ 1298 ABGB).<sup>1258</sup> Pure economic loss is also compensated for.

**351. France, Belgium, Luxembourg** In the French legal system the *responsabilité précontractuelle* is in the leading opinion of a tortious nature.<sup>1259</sup> The *Cour* confirmed this legal view unmistakably in 1988.<sup>1260</sup> In the Belgian legal academia also, the leading opinion tends towards a qualification of the *responsabilité précontractuelle* as liability of a tortious nature.<sup>1261</sup> This view was confirmed in a decision of the Belgian *Cour de Cassation* on 10th December 1981, in which a claim to compensation for damage caused by incorrect conduct on the occasion of the conclusion of a contract was qualified as being a tortious claim.<sup>1262</sup> In the Luxembourgian legal system also, the *responsabilité précontractuelle* represents liability of a tortious nature, according to the leading view.<sup>1263</sup>

**352. Sweden** *Culpa in contrahendo* is also a legal concept which is known in Swedish law, but it is seldom used in this legal system.<sup>1264</sup> The question of qualification for it is largely seen as being trivial, because nothing comes about from it. In Sweden in principle only negative interest is compensated for.<sup>1265</sup>

**353. England** English law does not recognise a distinct area of law that deals with pre-contractual liability. (It does, though, recognise that there may be situations where a party is prevented by his behaviour relied on to his detriment by the other side, from

<sup>1257</sup> Views to the contrary (tort law) are rare, see in particular *Reischauer* in Rummel-ABGB I<sup>3</sup> (2000) Introduction to §§ 918-933 no. 14.

<sup>1258</sup> *Harrer* in Schwimann, ABGB VII<sup>2</sup> [1997], § 1298 no. 19.

<sup>1259</sup> For an overview of this problem in the French legal system, see *Viney*, Introduction à la responsabilité<sup>2</sup>, no. 196-200 p. 354-366.

<sup>1260</sup> *Cass.com.* 28th June 1988, JCP 1988 éd. G, IV, p. 319 («*La victime d'une faute commise au cours de la période qui précède la conclusion d'un contrat est en droit de poursuivre la réparation du préjudice, qu'elle estime avoir subi, devant le tribunal du lieu du dommage, sur le fondement de la responsabilité délictuelle*»).

<sup>1261</sup> For an overview of the point of view in the Belgian academia see *Kruihof/Bocken/De Ly/De Temmerman*, Overzicht van rechtspraak (1981-1992) verbintenissen, TPR, p. 171-721.

<sup>1262</sup> *Cass.* 10th December 1981, RCJB 1986, p. 5, note *Wymeersch* («*celui qui, par son comportement fautif lors de la conclusion d'une convention, a causé au cocontractant un dommage, a l'obligation de réparer celui-ci; que l'action qui en résulte ne se fonde toutefois pas sur une relation contractuelle, mais sur la faute quasi délictuelle commise par l'intéressé à l'occasion de son intervention au contrat*»).

<sup>1263</sup> *Ravarani*, La responsabilité civile, no. 295 p 250.

<sup>1264</sup> *Kleineman*, Ren förmögenhetsskada (1987) 428 ff; *Kleineman*, Skadeståndsgrundande uppträdande vid avtalsförhandlingar, JT 1991-92 p. 125-140 (125 ff). For case law see *inter alia*: HD 3 April 1963, NJA 1963 p. 105 and HD 31 October 2002, NJA 2002 p. 467.

<sup>1265</sup> HD 22nd December 2000, NJA 2000 p. 712; further *Sandstedt*, Ersatz des positiven oder negativen Interesses, VersRAI 2001, 57-60.

pleading that a contract does not exist, at least where the contract requires formalities that were not completed).<sup>1266</sup> On the other hand various situations of liability have been recognized by English courts as giving rise to liability applying to different types of situations; principles of contract law, the law of negligence and the law of fraud from tort law and even in some limited areas, aspects of the law of equity in the form of trust law and “proprietary estoppel”. Each of these different approaches deals with pre-contractual situations that are perceived as having features that are capable of bringing it into these different areas of law.

354. **Common Law** First, it has been possible in some situations, where what is sought is a remedy for payment for work carried out,<sup>1267</sup> to base liability on contract law. These are situations where it has been possible for the courts to identify a separate contract covering matters that were done with a view to a more comprehensive contract, which then failed to come into existence. So, for instance, in one case a contractual agreement was recognised to pay for alterations made by one party to property belonging to it in a situation that was pre-contractual with respect to an intended contract of lease of that same property that was never finally concluded.<sup>1268</sup> Secondly, in situations where what is sought is compensation as damages for loss arising from then entering into a disadvantageous contract, liability arises within tort law where there was fraud on the part of the other party that induced the contract with him. Also within tort law a claim of this sort can, if certain requirements are satisfied as to the nature of the relationship between the parties, be based on negligent misrepresentation: a duty of care in negligence has been recognised as arising in situations where there the relationship between two parties in negotiations leading up to a contract between them, is such that the situation is one where one of the parties reasonably relies on the other for information on the basis of

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<sup>1266</sup> This aspect of estoppel is not strictly speaking an aspect of pre-contractual liability, since it operates in effect to treat a contract as existing and binding and it gives rise to expectation based liability. In Australia the law may have developed so that it becomes in effect a form of pre-contractual liability enabling reliance based damages to be claimed. (There are various different approaches in dicta in the seminal Australian case *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 587 where on one view the idea is associated with fraud and negligent misrepresentation as tort law remedies giving rise to pre-contractual liability. (per Brennan J) at 427 (quoted in *Elizabeth Cooke*, *The Modern Law of Estoppel* (2000) at 168.) This approach has been argued as inappropriate for English law (See *Elizabeth Cooke* op cit at 167-169).

<sup>1267</sup> Reflecting this constant feature of the facts of these cases has led to a debate amongst academic writers as to whether a better approach is in fact to see the question as within the law of restitution (unjustified enrichment). See *E McKendrick*, ‘Work done in Anticipation of a Contract which does not Materialise’, in W R Cornish, R Nolan, J O’Sullivan and G Virgo (eds) *Restitution: Past, Present & Future* (1998) 167. For the view that the contractual approach is the right one *S Hedley*, ‘Work done in Anticipation of Contract which does not Materialise: A Response’, in *ibid* at 195. See for a comprehensive discussion and argument that pre-contractual liability could be recognised as a category in its own right see *J Dietrich*, ‘Classifying pre-contractual liability: a comparative analysis’ [2001] *Legal Studies* 153, who refers also to Australian, Canadian and New Zealand Developments.

<sup>1268</sup> *Brewer Street Investment Ltd v Barclays Woollen Co Ltd* [1954] 1 Q.B. 428.

which the contract is then entered into, and that other can be seen as in a position that he has assumed a responsibility for the information. Owing to the perception that commercial parties normally can be taken as not having assumed other than by contract any duties to the other party in the negotiation, such a situation will not be readily recognised. But it has been for instance in a situation where one party was the prospective tenant under a contract of lease for a petrol filling station from the other party as landlord and the other party negligently misrepresented the likely turnover of the filling station.<sup>1269</sup>

**355. Equity** Thirdly, where an asset has been acquired by one party and there were pre-contractual negotiations between that party and the claimant which were such that it was contemplated that that asset would be acquired for both parties, and the one then took an unfair advantage by going ahead and acquiring on his own account,<sup>1270</sup> that asset will then be treated as held in part by the acquirer in trust for the other party. This solution is reached by a trust being seen as imposed *ex lege* as a “constructive trust”. This use of trust law is based on equity in the following sense: as, “what is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the [pre-contractual] arrangement or understanding on which the non-acquiring party has acted”. Reflecting this it has been held recently not to apply where the pre-contractual situation was one that was expressly stated in the negotiations between the parties to be “subject to contract”.<sup>1271</sup> Finally, a similar result can be reached in cases where there have been pre-contractual negotiations with a view to one party acquiring a right in the property of another, and again it is seen as unconscionable to permit the other party to disappoint that expectation. In these situations, however, the approach is based on an aspect of the law of estoppel, “proprietary estoppel”. The position is summarised in a leading text as that “it is crucial to show that the property owner indicated whether explicitly or implicitly that he considered himself bound to transfer the interest or right expected and that therefore it was safe and risk free to act in reliance on the assumption”.<sup>1272</sup>

**356. Scotland** The relating to pre-contractual liability in Scotland is in certain respects distinct from that in England. The artificial devices of English law in the last two categories just mentioned are not recognized at all.<sup>1273</sup> Similarly to the position in

<sup>1269</sup> *Esso Petroleum v Mardon* [1976] 1 Q.B. 891.

<sup>1270</sup> *Banner Homes Group PLC v Luff Developments Ltd* [2002] 2 All ER 117.

<sup>1271</sup> *London & Regional Investments Ltd v TBI PLC* [2002] EWCA Civ 355.

<sup>1272</sup> *Sean Wilken, Wilken and Villier's The Law of Waiver, Variation and Estoppel*<sup>2</sup> (2002).

<sup>1273</sup> Scots law contains a law of trusts, but the dominant view is that it is confined to express trusts and trusts which can be seen as impliedly intended to be created. This reflects a different conceptual structure from that of the English law of trusts and in particular that the concept of “unconscionability” which is central to doctrines within the law of equity in England is absent from the law, which has never recognised a distinction between law and equity. See G. L. Gretton, ‘Trust and Patrimony’ in H.L. Macqueen (ed) *Scots Law into the 21<sup>st</sup> Century: Essays in Honour of W.A. Wilson* (1996) 182- 193; G. L. Gretton, *Constructive Trusts* (1997) 1 *Edinburgh Law Review* 281 and 408. K.G.C. Reid, ‘Scotland’ in D.J. Hayton ed. (1999) *Principles of*

England, it has been possible in some situations, where what is sought is a remedy for payment for work carried out, to base liability on contract law. These are situations where it has been possible for the courts to identify a separate contract covering matters that were done with a view to a more comprehensive contract, which then failed to come into existence.<sup>1274</sup> Secondly, within the law of delict liability situations are recognized, where what is sought there is compensation as damages for loss arising from then entering into a disadvantageous contract either on the ground of fraud or negligent misrepresentation. The second of these bases of delictual liability was introduced by statute,<sup>1275</sup> since there was a precedent at appellate level, dating from before the development of the modern law of negligence, that had held that liability on this basis was not recognized. The fact that negligent misrepresentation cases of this type are based on statute has led in one first instance case<sup>1276</sup> to an indication that there is no requirement as there is in English law for a special relationship, and assumption of responsibility by the defending party needs to be established as a necessary pre-condition for liability. However, it is clear that the statutory provision was introduced to clear a barrier in the law to its being the same as in England and the better view is, accordingly that there is no difference.<sup>1277</sup> Thirdly, and significantly in contrast to English law, Scotland has a doctrine of law giving rise to liability for expenditure incurred through the lack of good faith in pre-contractual negotiations. The exact scope of the doctrine is as yet not fully clear. It is a claim for reimbursement of expenditure that was expended “in reliance on the implied assurance by [the other party] that there was a binding contract between them when in fact there was no more than an agreement which fell short of being a binding contract”<sup>1278</sup> It is clear that there must be more than just a hope of a contract materialising.<sup>1279</sup> The basis of liability is best seen as *sui generis*, and not based on either contract law nor on delict.<sup>1280</sup> It may be predicted that the basis of liability will, when a suitable case arises in the future, be seen as a doctrine based on a requirement of good faith in negotiations, and as such the doctrine of *culpa in*

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European Trust Law 67-84; J.W.G. Blackie, *Le Trust Ecosais: Un Cas Unique? – Trusts in the Law of Scotland* in Madeleine Cantin Cumyn (ed.), *La fiducie face au trust dans les rapports d'affaires/Trusts vs Fiducie in a business context* 118-151.

<sup>1274</sup> *Avintair Ltd v Ryder Airline Services Ltd* 1964 SLT 613. There is a dispute in the academic literature as to whether these cases are more appropriately decided as cases within the law of unjustified enrichment (For that view see *Hector L MacQueen and Joe Thomson*, *Contract Law in Scotland* (2000) para 1.39 which may be compared with the contract approach in *W.W. McBryde*, *The Law of Contract in Scotland*<sup>2</sup> (2001) para 5-13).

<sup>1275</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 section 10.

<sup>1276</sup> *Hamilton v Allied Domecq PLC* 2001 SC 829.

<sup>1277</sup> See *Joe Thomson*, *Misrepresentation*, 2001 SLT (Articles) 279-282.

<sup>1278</sup> *Dawson International plc v Coats Paton plc* 1988 SLT 854 per Lord Cullen at 866 (affirmed on appeal 1989 SLT 854).

<sup>1279</sup> Per Lord Cullen at 866.

<sup>1280</sup> The case, *Walker v Milne* (1923) 2 S 379 which is seen as having introduced the doctrine is equivocal (See further *J.W.G. Blackie*, *Good Faith and the Doctrine of Personal Bar*, in A. D. M Forte (ed.), *Good Faith in Contract and Property* (1999) 129 at 153-55).

contrahendo.<sup>1281</sup> It has been held to be quite distinct from a claim based on fraudulent or negligent misrepresentation.<sup>1282</sup> It has been applied in a situation where there was a strong implied assurance but the contract never came into existence as there was withdrawal between agreement in substance having been reached and its being put into the form necessary to satisfy the requirements of the law with regard to contracts relating to land.<sup>1283</sup> The modern authorities suggest that it will require a very strong case for liability to arise, at least beyond these cases where there was in substance a contract, but it was a type that required certain formalities in law and there was then unilateral withdrawal before these were completed. The one attempt where the doctrine was potentially applicable<sup>1284</sup> in a commercial situation was unsuccessful. The parties were negotiating towards a contract for the purchase or merger of the business of one of them by the other.<sup>1285</sup> However, it is still possible that the doctrine may be applied in cases other than those where there was in substance a contract, but formalities were required and withdrawal occurred before they were satisfied. Finally it should be noted that as Scots law recognised the concept of a binding, unilateral promise (which in commercial transactions does not have to be in writing),<sup>1286</sup> there can be liability for breach of a promise to give a party a chance to make an offer. The standard example is a promise to be open to offers until a particular time, which is quite standard practice in the sale of houses in Scotland.<sup>1287</sup>

## (2.) Consumer Protection

357. **General** Also in the area of consumer protection, the question of whether the inappropriate conduct of a supplier in the run up to, or in connection with the conclusion of a contract is to be qualified as tortious or contractual, often plays a particular role, not only on the level of international private law and procedural law, but also on the level of substantive law. For a tortious qualification of some of these rules, on the whole, the combating of unfair competition is its advantage, for a contractual qualification, on the other hand, the connection with the strived-for conclusion of the contract is its advantage.

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<sup>1281</sup> This has been very persuasively argued for in *Hector L MacQueen*, Good Faith in the Scots Law of Contract: An Undisclosed Principle?, in A. D. M Forte (ed.), *Good Faith in Contract and Property* (1999) 5 at 22-33. The leading text on contract law is content to call the basis of liability after the name of the subject matter in the case that introduced it into the law, as “Melville monument liability” (*W. McBryde*, loc.cit. para 5-63).

<sup>1282</sup> *Bank of Scotland v 3a plc* 1990 SC 31.

<sup>1283</sup> *Walker v Milne* (1923) 2 S 379; *Hamiton v Lochrane* (1899) 1 F 478.

<sup>1284</sup> The other modern authority, *Bank of Scotland v 3a plc* 1990 SC 31, concerned facts where it was not potential applicable as it involved a representation by a third party.

<sup>1285</sup> *Dawson International plc v Coats Paton plc* 1988 SLT 854.

<sup>1286</sup> Requirements of Writing (Scotland) Act 1995 section 1.

<sup>1287</sup> *Littlejohn v Hadwen* (1882) 20 SLR 5.

**358. Sale of consumer goods** The European legislator had to struggle with problems of the dichotomy of contractual and tortious liability, in particular with the drafting of Directive 1999/44/EC of the European Parliament and Council from the 25th May 1999 on particular aspects of the sale of consumer goods and guarantees for consumer goods.<sup>1288</sup> The reason for consideration (3), moreover, emphasizes that the legal measures of the member states on the sale of consumer goods show differences which could have the effect of distorting competition for the sellers. The Directive concentrates above all on problems of the alignment of the law of goods breaching a contract and adds in this connection (reason for consideration 6) that such an alignment may only occur “without however impinging on provisions and principles of national law relating to contractual and non-contractual liability.” However, it (reason for consideration 23) “may be necessary to envisage more far-reaching harmonisation, notably by providing for the producer’s direct liability for defects for which he is responsible.” In the actual text of the Directive, art. 8 (1) regulates its relationship to the autonomous liability law of the member states as follows: “The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.” The foundation for the proposal of the Directive was taken over unchanged from that of art. 8 (1),<sup>1289</sup> it refers once again to the character of the Directive as being of minimum protection and adds that it wants to neither touch the liability of the producer, nor that of the seller relating to the compensation of other losses which the purchaser has sustained as a result of the defect in the article purchased. For example, where as a result of a defect in a carpet cleaning machine the carpet is damaged, or, for instance, where as a result of defects in a motor vehicle a substitute is hired. It goes without saying that the rules of the national laws with respect to damages remain applicable as cumulative remedies”.<sup>1290</sup>

**359. Promises of winnings: France** A nice example of the numerous border shifts between contract and tort law in consumer protection law is also provided by the question of liability for promises of winnings sent to addressees without their prior request. In two leading decisions of the 6th September 2002,<sup>1291</sup> the French *Cour de Cassation* in *chambre mixte* decided upon the principles of civil law liability of companies which had organized a lottery for advertising purposes. They had sent consumers letters which contained information concerning exactly described amounts of winnings, but later referred to the fact that the addressees had in reality only been selected as participants in a further draw. Up until these two decisions, courts in France had essentially fallen back upon tortious liability in accordance with art. 1382 CC to provide redress in these cases. This liability

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<sup>1288</sup> OJ 7th July 1999, L 171/12.

<sup>1289</sup> With the exception that art. 8 (1) of the Directive was found in art. 7 (1) of the Directive proposal.

<sup>1290</sup> Grounds for art. 7 of the Directive proposal, printed (in the German language) amongst other places in ZIP 1996, 1845, 1852.

<sup>1291</sup> Cass.ch.mixte 6th September 2002 (98-22.981), Bull. civ. (Chambre mixte), n° 4 p. 9; Cass.ch.mixte 6th September 2002 (98-14.397), JCP 2002 éd. G, II, 10173 (1<sup>er</sup> arrêt: *Marchewka*), note *Reifegerste*.

was recognized if (and because) the advertising document led the consumer to be confused. It had, however, already been decided that a contractual claim for performance or an *engagement unilatéral de volonté* could come into consideration.<sup>1292</sup> In the *Arrêt* n° 212 of the 6th September 2002 (no. 98-22.981) the *Cour de Cassation* decided in favour of basing a claim to performance in the law of quasi-contracts (art. 1371 CC).

### (3.) Product Liability

#### (a) Scope and Limits of EU Legislation

**360. Uniform European regime of products liability still missing** The European legislature, as is well known, dealt from an early stage with the harmonisation of liability for defective products. It would of course be a mistake to assume that the EU Product Liability Directive has brought about a really EU-wide, unified regime of liability. This is not only because the Directive only concerns liability in respect of consumers and has itself expressly left a few special questions of non-fault-based non-contractual liability unregulated, but above all because product liability in its totality represents a complex network made up of contractual and non-contractual liability, fault-based and non-fault-based liability and producer and seller liability. The most recent case law of the ECJ on art. 13 of the Directive<sup>1293</sup> has already made some of these coordination problems clearly visible. In addition to the decisions of *Commission v. Greece*<sup>1294</sup> and *González Sanchez v Medicina Asturiana SA*,<sup>1295</sup> the case of *Commission v France*<sup>1296</sup> is particularly to be referred to. In this judgment the French implementing law was condemned for allowing recovery of the first 500 Euros; for making suppliers liable on the same basis as producers; and for imposing the extra condition that the producer must prove that he took appropriate steps to avert the consequences of a defective product in order to invoke the compliance with mandatory requirements and the development risks defence. The Court in *Commission v France* stated that art. 13 does not allow member states to maintain a general system of product liability different from that provided for in the Directive. It went on to state that contractual and non-contractual liability can, however, exist on grounds such as fault or a warranty for latent defects. It also stated that the special liability scheme exception is limited to specific schemes limited to a given sector of production.<sup>1297</sup> The effects of this decision on the national contract and tort law are possibly much more widespread than has been thought up until now. It is unclear, for

<sup>1292</sup> Further *Avis de M. de Gouttes, Premier avocat général*, available online on the internet site of the *Cour de cassation* under [www.courdecassation.fr](http://www.courdecassation.fr).

<sup>1293</sup> Art. 13 reads: "This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified."

<sup>1294</sup> Case C-154/00 [2002] ECR I-3879.

<sup>1295</sup> Case C-183/00, [2002] ECR I-3901.

<sup>1296</sup> Case C-52/00, [2002] ECR I-3827.

<sup>1297</sup> Further *Howells*, Product Liability, in: *Towards a European Civil Code*<sup>3</sup> (forthcoming; manuscript made available to the author prior to publication).

example, whether and to what extent liability (close to strict liability) for the self-destruction of a product may be stuck to or whether and under which pre-requisites forms of strict contractual liability of producers and sellers may be maintained, which in their practical outcome have a tougher effect than the liability for defects under the Product Liability Directive (which has conspicuously seldom been referred to in national case law until now). Comparable questions spring to mind where the liability of producers is nominally furthermore based upon negligence, which from the burden of proof rules developed by the national courts has brought about a liability regime which is more burdensome for the producer than that under the Directive. These questions may, however, have been the subject of one of the special studies<sup>1298</sup> requested by the European Commission which are presently at their disposal. Therefore they are not dealt with here in detail; the following short observations suffice.

(b) Liability of producer and seller

361. **Privity of contract** In the area of product liability, principally the liability of the producer and that of the seller are to be differentiated. This is because art. 3 (3) only treats the supplier of a product equally with the producer in a case where the supplier can not give the injured party the name of the producer. The supplier naturally is also liable to the purchaser (depending upon the relevant concurrence of actions rules sometimes even only) following contract law principles which admittedly can not be gone into individually here (see above paras. 283-315).<sup>1299</sup> More complicated, on the other hand, are things in the area of producer's liability in respect of consumers and subordinate traders within the chain of sales. This is where the main problem in the relationship of the liability regimes of contract and tort exists, in the question of how strictly the principle that contractual claims principally only exist between persons who have concluded a contract with one another, is to be followed (privity of contract). There are legal systems which strictly obey this principle and therefore persons who did not buy the product from the producer only have a claim in tort against him. Germany is an example of this,<sup>1300</sup> likewise Italy. There are, however, also legal systems which have extended the circle of persons who can make a claim following the rules of contract law. Belonging to this group of legal systems are above all France and Austria.

<sup>1298</sup> The scope of the study was envisaged in COM (2000) 893 at 29-31. This study was carried out by the law firm Lovells and Professor *Howells* (Sheffield University).

<sup>1299</sup> The occasionally extraordinarily complicated question of the relation of general product liability and sellers liability can not be individually examined here. Art. 25 of the Spanish consumer protection law, provides for example, for sellers liability to have reverse burden of proof in respect of the damage which was caused to the consumer by the product sold to him. Whether this liability is contractual or tortious according to Spanish standards is unclear. It can only be pointed out here that indeed Swedish consumer sales law [*konsumentköplag* (1990:932)] in § 31 recognizes sales law liability also for damage to other objects as well as to the purchased object if it belongs to the purchaser or a person of his household, "normal" sales law does not, however: § 67 sentence 2 sales law [*köplag* (1990:931)].

<sup>1300</sup> *Potter*, *Produzentenhaftung in Deutschland und den USA – Rechtsvergleich, Risikomanagement und Versicherungsschutz*, Phi 2002, 156-164 (157).

**362. Germany** In German law, contractual claims only come into consideration if in an individual case a contract actually exists between the producer and the injured party.<sup>1301</sup> If the consumer buys the goods from a trader, on the other hand, then direct contractual relations between the customer and the producer are excluded. The instructions for use included with a product are not grounds for a contract for information.<sup>1302</sup> A contract of guarantee between the producer and the consumer would indeed be plausible, but its construction would be without practical worth because everything which concerns the performance of the product (compare § 3 (1)a Product Liability Law) can already lead to liability under the product liability law. Advertising in general also contains no contractual declaration of intention.<sup>1303</sup> Only in individual cases can an individual declaration of a guarantee by the producer be directed at the customer of the first purchaser.<sup>1304</sup> In the relationship between producer and consumer there is neither liability for reliance analogous to § 122 BGB,<sup>1305</sup> nor a duty to compensate from the principles of *culpa in contrahendo* (§§ 241 (2), 311 (2) and (3) BGB)<sup>1306</sup> arising from statements in advertising leaflets/brochures, according to the case law. Compensation claims also regularly turn out not to be from the contract between the producer and the trader. A contract with a protective effect in favour of a third party is ruled out completely in the case of a sales or services contract between the producer and the first purchaser.<sup>1307</sup>

**363. Italy** In Italy things are no different to in Germany. The Directive of the 25th July 1985 no. 374 was implemented by the D. p. r. of the 24th May 1988, no. 224. Due to Italy, as shown, principally likewise following the principle of the concurrence of claims between contractual and non-contractual liability, contractual liability also has a part to play in product liability. In this respect, purchase contract and possible contract for services, claims (from arts. 1667, 1668 and 1669 CC ) come into consideration. They require, however, a direct contract with the producer, which is normally lacking. The *Corte di Cassazione* decided recently that in the relationship of the final consumer and the producer, the application of sales law does not enter the equation if the final consumer got the product from a supplier.<sup>1308</sup>

**364. Greece** The Greek legislature regulated liability for defective products in accordance with the model of the Product Liability Directive in the consumer protection law 2251/1994. Up until then the producer's liability had been purely regulated in tort (with a reversal of the burden of proof in favour of the injured party); contractual concepts had been rejected by the Greek case law.<sup>1309</sup> Claims from the law of

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<sup>1301</sup> BGH 19th November 1991, NJW 1992, 1039, 1041.

<sup>1302</sup> BGH 11th October 1988, NJW 1989, 1029.

<sup>1303</sup> BGH 26th November 1968, BGHZ 51, 91, 98 f.; BGH 21st June 1967, BGHZ 48, 118, 122 f.

<sup>1304</sup> Palandt-Thomas, BGB<sup>62</sup>, § 15 ProdHaftG, no. 5.

<sup>1305</sup> BGH 26th November 1968, BGHZ 51, 91, 100.

<sup>1306</sup> BGH 14th May 1974, NJW 1974, 1503, 1504.

<sup>1307</sup> Palandt-Thomas, BGB<sup>62</sup>, § 15 ProdHaftG, no. 6.

<sup>1308</sup> Cass. 21st January 2000, n. 639, in Foro it., Rep., 2000, Vendita, no. 3.

<sup>1309</sup> In-depth on this *Eleftheriadou*, VersRAI 1998, 20.

sales contracts require a direct contractual relationship between the injured party and the party liable. Amazingly the consumer protection law from 1994 (in contrast to its predecessor in art. 16) no longer recognizes a provision whereby the rights, which the injured party has on the grounds of the provisions on contractual (or non-contractual) liability, remain untouched. Nonetheless it is assumed that this principle still applies today.<sup>1310</sup> It may be justified by art. 14 (5) of the current consumer protection law, which reads: “If in a concrete case general provisions afford the consumer greater protection than the special regulation of this law, the general provisions are to be applied. Excepted from this are provisions on limitation and exclusion periods.”<sup>1311</sup>

**365. France** France implemented the Product Liability Directive with *Loi n° 98-389* of the 19th May 1998. The relevant rules were placed in articles 1386-1 to 1386-18 CC. Art. 1386-1 CC determines that a producer is liable “for damages caused by a defect in his product, whether he was bound by a contract with the injured person or not”. This means in particular that the French legislature, for the area of producer’s liability, no longer stuck to the principle of the *non cumul des responsabilités*.<sup>1312</sup> Art. 1386-18 CC confirms in this respect that following this, product liability based on Community law leaves untouched the contractual and non-contractual bases for claims existing in autonomous French law. The plaintiff can choose between the new and the traditional liability regimes; each is *facultatif dans le principe de son application*.<sup>1313</sup> From article 1386-1 CC it is concluded by the academia that not only the *victimes non professionnelles*, but also the *victimes professionnelles* can rely on this new regime, which clearly goes beyond the restrictions of the Product Liability Directive.<sup>1314</sup> The same applies for the assumption based on art. 1386-11, 2° CC, that the proof of a defect is sufficient to form the assumption that the defect already existed at the time of the *mise en circulation*.<sup>1315</sup> The breach of Community law of art. 1386-7 CC, whereby a seller, or even “a hirer, with the exception of a finance lessor or of a hirer similar to a finance lessor, or any other professional supplier” is subject to the Community law liability regime, has already been established by the ECJ, as has already been shown.

**366. Contract law** The remaining legal provisions on which a plaintiff can base a claim, are of a tortious or contractual nature. The most important advantage of these alternative bases for claims is that they are not affected by the short, product liability law limitation period geared towards the Directive.<sup>1316</sup> Belonging to the alternative bases of claims is liability due to *vices cachés*, claims for which indeed have to be brought within a “short period”, but following continuous case law they can be enforced by the final

<sup>1310</sup> *Alexandridou*, *Dikaio tis prostasias tou katanaloti*, no. 239.

<sup>1311</sup> *Karakostas*, *Prostasia tou katanaloti*, 233 thinks correspondingly, that the civil law measures which afford a lot of protection may be applied parallel to the consumer protection law or independantly.

<sup>1312</sup> *le Tourneau/Cadiet*, *Droit de la responsabilité et des contrats* (2002/2003), no. 8404-8405.

<sup>1313</sup> *le Tourneau/Cadiet*, no. 8366.

<sup>1314</sup> *le Tourneau/Cadiet*, no. 8406.

<sup>1315</sup> *le Tourneau/Cadiet*, no. 8416.

<sup>1316</sup> Further *Chabas*, *La loi du 19 mai 1998 et le droit commun*, *Gaz.Pal.* 1999 doc., 565-567.

consumer not only against direct sellers and contracting partners, but over and above this, against the producer and every intermediary dealer.<sup>1317</sup> The principle of the privity of contract in this respect does not apply in France; a claim for “hidden defects” passes respectively with the ownership to the next purchaser in the chain. The decisive advantage of this claim lies in the fact that through it, compensation can be sought for damage caused by the defective object, as well as for the damage to the object itself.<sup>1318</sup> The latter is not the case according to the product liability regime of art. 1386-2 CC.

**367. Austria** Before the product liability law (PHG of 1988)<sup>1319</sup> introduced into Austria product liability independent of fault (§ 8 PHG), producer’s liability was judged using general compensation law principles. Tortious liability therefore appeared to be less suited for a number of reasons (limitation of the liability for assistants; allocation of the burden of proof).<sup>1320</sup> The academia and case law therefore, similarly to in France, took the path of awarding consumer claims against the producer from his contract with the trader; this contract applied protective effects in favour of the purchaser.<sup>1321</sup> The purchaser was placed in the same position by this, as if he was the contracting partner of the producer. There was no liability for pure economic loss, though,<sup>1322</sup> and an exclusion of liability was possible through agreement.<sup>1323</sup> This contractual basis for claims may not have become obsolete through the product liability law.<sup>1324</sup> This is because following § 15 PHG all the grounds for claims existing outside of this law remain untouched by the Community law-arranged product liability.<sup>1325</sup> In this respect the injured party has the right to choose.<sup>1326</sup>

#### (4.) Defective Services

**368. The failure of the proposal for a directive** As for the law of liability for defective products, the law of liability for defective services, now as before, is divided into contract law and tort law branches. Indeed it has been attempted to go a step further for the law of service liability than for the law of product liability and to create for it, a unified regime

<sup>1317</sup> Further *Malaurie/Aynès/Gautier*, *Contrats Spéciaux*<sup>14</sup> (2001) no. 417 p. 295.

<sup>1318</sup> *Malaurie/Aynès/Gautier*, loc.cit. no. 411 p. 293.

<sup>1319</sup> *Produkthaftungsgesetz* of 21st January 1988, BGBl 1988/99.

<sup>1320</sup> *Reischauer* in *Rummel-ABGB II*<sup>2</sup> (1992) § 1295 no. 35; *Koziol and Welser*, *Bürgerliches Recht II*<sup>12</sup> (2001) 353.

<sup>1321</sup> OGH 4th February 1976, SZ 49/14; *Koziol*, *Haftpflichtrecht II*<sup>2</sup> (1984), p. 93; very critical *Reischauer* in *Rummel-ABGB II*<sup>2</sup> (1992) § 1295 no. 37.

<sup>1322</sup> *Koziol*, *Haftpflichtrecht II*<sup>2</sup> (1984) 92.

<sup>1323</sup> OGH 28th November 1978, SZ 51/169.

<sup>1324</sup> According to *Posch* in *Schwimann*, *ABGB VIII*<sup>2</sup> (1997) § 15 *ProdHaftG* no. 3 these are almost unanimously assumed from the (not further explained) academia. Implicitly also *Preslmayr*, *Handbuch der Produkthaftung*<sup>2</sup>, 99f.

<sup>1325</sup> The formulation of § 15 *ProdHaftG*, that this only applies to damage in a further extent, is to be interpreted restrictively. See *Posch* in *Schwimann*, *ABGB VIII*<sup>2</sup> (1997) § 15 *ProdHaftG* no. 1.

<sup>1326</sup> *Posch*, loc.cit., no. 2.

incorporating contract *and* tort law, but this attempt failed. The proposal of the Commission for a Council Directive on the Liability of Suppliers of Services<sup>1327</sup> never became enforced law. With the exception of Greece (see para 369), the national legal systems of the member states have until now not followed the model of this Directive proposal. The two-tier nature of liability from contract and tort remained preserved. The Spanish consumer protection law also only contains provisions on services which are performed in connection with the sale of a product, and the same applies for numerous national product liability laws, eg. the Austrian product liability law.<sup>1328</sup>

**369. Greece** In contrast to all the other member states of the EU, the Greek legislature considered it appropriate to regulate the law of liability for services in art. 8 of law 2251/1994 in such a way which corresponds with the last draft of the previously mentioned Directive proposal. Art. 8 loc.cit. astonishingly has only very recently triggered off a lively discussion. To begin with it was even assumed that art. 8 loc.cit. merely has declaratory importance.<sup>1329</sup> Today however, the significance of art. 8 as an independent basis for claims is widely recognized.<sup>1330</sup> It enters, with the traditional contractual and tortious claims, into a concurrence of claims. This clearly arises from the materials on the consumer protection law ("The introduction of liability for services with a reversal of the burden of proof may be an important and sensible first step because the principles of liability of the CC are not abolished and at the same time the "armery" of the consumer is strengthened.")<sup>1331</sup> Many individual aspects are now as before, controversial. It is indeed clear from the wording of the law that the "fault" of the performer of a service is refutably assumed, but the law does not expressly refer to the requirement of the defectiveness (or unlawfulness) of the service. The Greek academia interpolates this requirement, but up until now could not agree upon the question of who has the burden of proof for the defectiveness of the service.<sup>1332</sup> Furthermore with mixed contracts (for example a contract with a hotel), it is controversial whether and under which prerequisites the sale or renting of objects may be seen as a service, whether art. 8 also concerns produced goods in the way of services and whether non-material damage must be compensated for. It is not disputed, on the other hand, that liability from art. 8 loc.cit. requires neither a contract nor even a payment basis (art. 8 (4) lit f of law 2251/1994). As the beneficiaries of a claim, in addition to the receivers of the service, third parties also enter the equation; it is only required that the service is rendered to a consumer.<sup>1333</sup>

<sup>1327</sup> OJ C 12 of 18th January 1991, p. 8. Further *v. Bar*, The Common European Law of Torts, vol. 1, paras. 391-392.

<sup>1328</sup> *Preslmayr*, Handbuch der Produkthaftung<sup>2</sup>, 51.

<sup>1329</sup> *Gouskou*, DEE 1997, 660, 665; similarly *Filios*, *Enochiko Dikaio I/II*, p. 231.

<sup>1330</sup> *Karakostas*, *Prostasia tou katanaloti*, 130; *Trouli*, *Probleme und Entwicklung der Dienstleistungshaftung*, 133.

<sup>1331</sup> Introductory remarks on the law 2251/1994, p. 4.

<sup>1332</sup> On this *Eleftheriadou*, *Die Haftung aus Verkehrspflichtverletzung im deutschen und griechischen Recht* (diss. Osnabrück 2003; not yet printed).

<sup>1333</sup> *Trouli*, loc.cit. 163.

## (5.) Liability for Misinformation\*

## (a) Italian system

## (i) Misinformation

370. **The notion of information** The term information has today assumed a variety of meanings of significance to the lawyer. At a first level, that of content, information means any data representing the reality which is kept by a person or communicated from one person to another. At a second level, that of functionality, the term information includes those activities of information to the public conducted through various means such as press, radio and television. A third, specialised, meaning of information is the obligation created on persons when they enter into relations with others, as occurs in contractual negotiations or the presentation of goods or services the subject of legal relations. For a simple summary, one can say that “information” in a legally significant sense may be defined as data representing reality capable of being communicated.<sup>1334</sup>

371. **Duties to inform** Apart from the qualification of information as an activity in the broadcasting of news and commentary through mass media, there is also its characterisation as the subject of a service. The service may constitute the purpose of the contract, or be a collateral service. Again the information may constitute the subject of an obligation to co-operate or else the means by which a tort is committed; by act if the information is intentionally or culpably erroneous or misleading; by omission if the information was not given in circumstances in which the tortfeasor had the obligation to supply it. The law requires that certain persons give certain information considered important for the choices which must be exercised by others. In the Italian system it can be viewed as a real obligation, for breach of which damages may be claimed, or else it may be seen as a functional burden upon the valid formation of legal relations. Such conduct may concern both private persons and public entities, and may be imposed by administrative law, criminal law or private law. An exhaustive list of these obligations of information could prove interminable. One need only think that in civil law such a type of obligation may be found in the law on pre-contractual liability,<sup>1335</sup> in the duty of frank and proper conduct in negotiations, in the formalities for the call of meetings, in the establishment of informed consent etc. If then one refers to the copious, and mainly administrative, laws relating to economic activity, it appears obvious that the obligations of information assume a vital role in relation to the valid formation of legal acts or binding legal relations, or the liability of parties. The examples are countless, running from the rules for labelling to liquidation sales, from share offer prospectuses to the indication of net weight, from medicinal leaflets to the composition of textiles, from interest rates to prices for public services.<sup>1336</sup> In these cases, the notion of information assumes a different value.

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\* Authored by *Guido Alpa* (Rome); sub-edited by *Christian v. Bar*.

<sup>1334</sup> Cf. *Zeno-Zencovich*, entry «Informazione», in *Digesto delle discipline privatistiche* (1999) vol. IX, 420 et seq.

<sup>1335</sup> Cf. *Grisi*, *L'obbligo precontrattuale di informazione* (1990).

<sup>1336</sup> Cf., *Zeno-Zencovich* loc.cit. 423, nos. 16-22.

What matters above all is its content which, however, varies in relation to what may be the expectations, interests or rights of the other party. It should be supplied so that the formation of the will is not affected by ignorance, but also so that the person may use correctly the goods or services. The addressees may already be identified or simply belong to a class. The forms of presentation vary according to the circumstances following principles of efficiency determined by the law or else designed for the purpose of achieving awareness.

**372. The information marketplace** In view of the observations made so far, what appears undeniable is that awareness of facts and circumstances, thanks to the spread of data, is considered essential for the proper conduct of certain social processes, notably the economy.<sup>1337</sup> Normally legal relations are used for the acquisition of information, whether as a single transaction or on a periodical basis. To these should be added the activities of public and private persons who supply upon request or broadcast to the public freely information which they consider useful for the community. Thus the “information marketplace” is constantly expanding, and is the subject of growing study, investment and regulation.<sup>1338</sup> As regards the appropriation of information, this type of property has particularities, since without a material element it can circulate freely and is capable of infinite reproduction. The aspect of liability of the information provider raises particular difficulties. The main problems lie in the identification as to who is subject to obligations of information, within what limits and in relation to whom, as well as the consequences which may arise from any breach of such obligations.<sup>1339</sup>

**373. The legal framework in Italian law** Given the great variety of information services, the legal framework of reference is rather vague and the boundaries between contractual and tortious liability are fluid. In contract law, the theories are manifold. Some may be reduced to specific rules, others stem from the general rules contained in the Civil Code (CC) in relation to the application of standards (e.g. the standard of care of the *paterfamilias*, professional duty of care under Art. 1176 (1) and (2) CC), or else general provisions (e.g. good faith under Art. 1175, 1337, 1366, 1375 CC). In tort law one may resort either to the general provisions for liability for culpable or fraudulent action (Art. 2043 CC) or rules which provide for liability of an objective type (Art. 2049 et seq.). These rules receive wide application by judges. Problems relating to misinformation are, in our experience, mainly resolved by means of rules arising from case law.

**374. Inaccurate information and reputation** The broadcasting of information is also the basis for the responsibility of the journalist for the transmission of unfounded news or

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<sup>1337</sup> Cf. *Predieri*, Il diritto all'informazione economica nelle costituzioni contemporanee, in misc., L'informazione nell'economia e nel diritto (1990) 105.

<sup>1338</sup> Cf. *Sieber*, Liability for On-line Data Bank Services in the European Community (1992).

<sup>1339</sup> Cf. *Alpa*, Il problema dell'atipicità dell'illecito (1979) 230 et seq.; *Luminoso*, Responsabilità civile della banca per false o inesatte informazioni, Riv. dir. comm., 1984, I, 189; *Busnelli*, Itinerari europei nella «terra di nessuno tra contratto e fatto illecito»: la responsabilità da informazioni inesatte, Cel 1991, 539.

that damaging the honour or reputation<sup>1340</sup> of physical or legal persons. In this connection it is necessary to safeguard certain constitutional principles such as the freedom of the press (Art. 21 of the Constitution) and the protection of the person (Art. 2 of the Constitution). The courts' pronouncements on this are frequent. The Court of Cassation, by Judgment of 1992, set limits to the legitimacy of information.<sup>1341</sup>

**375. Economic reputation** In a similar perspective, the proliferation of cases of damage to economic reputation merits particular attention.<sup>1342</sup> An important decision of the Milan Court of Appeal<sup>1343</sup> gives an example, confirming the criterion of legitimacy of the *Warentest*, if not mistaken.<sup>1344</sup> In particular it cannot be considered a duty for

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<sup>1340</sup> Cf. the review of *Tenella-Sillani*, in *Dir. inf.*, 1985, 479.

<sup>1341</sup> "The distribution through the press of a story offensive to a certain person's reputation may not ipso facto give rise to an essential element of a civil tort, implying compensation for injury caused, only when the news itself reflects the truth. This lack of actionability applies so long as the news is not reduced to its bare minimum, but is supplied with particulars, provided that these are not imaginary nor changing the essential substance of the story, sufficient for a complete account – and there is a social interest in its distribution which is known as the right to report or the right of information".

Cf. Cass. 6 August 1992, n. 9348, in *Giust. civ. mass.*, 1992, fasc. 8-9. Again it was confirmed in a judgment of 1998 (Cass. 28 August 1998, n. 8574, in *Corriere giuridico*, 1999, 462, note by *Mancini*) that: "In respect of a journalistic article which, whilst reporting news which in itself is true, nevertheless is drafted in such a way as to generate confusion for the reader, there may be the elements of a civil tort. This is so because, with malicious intent or blameworthy, the information essential for the correctness and completeness of the news, though contained in the text, is not given sufficient importance, but, on the contrary, is inserted in such manner as to appear "absorbed" by other conflicting and more suggestive elements of news. In any case, since the message of the journalist is not always of the same content and does not draw from an unchangeable scenario, its harmful potential is not assessable abstractly, but by reference to the particular case, by means of establishment of the facts, as such reserved to the judge of the merits and unchallengeable in this forum of legitimacy, if properly reasoned.[...]."

<sup>1342</sup> A decision of the Rome Court, of 1984, has noted that the propriety of the so called *Warentest* (a news report which assumes or diffuses test results on the qualities of a product or various interchangeable products) should be judged on the basis of the criteria of how serious or scientific is the method followed in comparative analysis of the various products. The possible erroneousness of the results achieved is irrelevant, unless such erroneousness was known or recognisable by a journalist of average professional qualification. (cf. *Trib. Roma*, 24 July 1984, in *Foro it.*, 1984, I, 1963, with note by Troiano).

<sup>1343</sup> Cf. *CA Milan* 16 October 1973, in *Foro pad.*, 1973, I, 454. It is interesting to note a step in the reasoning, in which, discussing the evaluation technique for the news, the judges referred to the case law of the Constitutional Court, in which it was denied that commercial publicity could be protected by art. 21 of the Constitution, and further underlined that there was freedom of information in economic matters.

<sup>1344</sup> The same criterion was pronounced in the first instance judgment (*Trib. Milan* 28 September 1972, in *Giur. amm. dir. ind.*, 1972, 1210) but the dispute was decided with the opposite result, on account of divergence in the facts.

journalistic news to follow a rigid and totally scientific approach when giving news of the qualities of a product or several products which are interchangeable. A broader approach is legitimate provided that it respects the above limits, including opinions which are based on general culture and which in any case is shared by the overwhelming majority of those receiving the news. This is very much the case where the information is an element of the business of the defendant or the specific content of an agreement, and is such to determine by itself choices which may be damaging in the hands of the recipient,<sup>1345</sup> inducing him for example to give credit to a person presented to him as solvent by the informer.<sup>1346</sup> On other occasions the erroneous news will lead to unfavourable conduct towards the person about whom the information refers.<sup>1347</sup>

**376. Technical and scientific information** It is obvious that a valuation of the exactitude of technical and scientific testing supposes the use of criteria of identical nature, which the journalist is not bound to possess.<sup>1348</sup> It would be neither practical nor logical to claim in every case verification of the data (notions, measurements, checking etc),

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<sup>1345</sup> Cf. Cass. 22 January 1976, n. 185, in GC, 1976, I, 512; CA Palermo, 11 June 1959, in FP, 1960, I, 420.

<sup>1346</sup> Cf. CA Milan 14 March 1986, in BBTC, 1987, II, 627; CA Bologna, 16 January 1954, in FP, 1954, I, 273; Trib. Naples, 26 July 1957, in Tnap, 1958, I, 320; Trib. Bologna 17 October 1952, in Foro it., 1953, I, 422.

<sup>1347</sup> In particular, on account of the diffusion of false news concerning the solvency of a business, liability attached to both the company which commercially gathers and distributes information and the credit insurers which passed the news to its own client without consideration (Cass. 11 November 1978, n. 4538, in Resp. civ. e prev., 1979, 747; CA Milan 11 December 1973, in Resp. civ. e prev., 1979, 747). A commercial intelligence agency that supplies to third parties incorrect information relating to a business is liable under art. 2043 of the Civil Code. The act of offering a different financial situation from that really pertaining constitutes a breach of the duty of care in research (Cass. 6. I. 1984, n. 94, in Resp. civ. e prev., 1984, 674). Damages are due also to the entrepreneur about whom has been distributed false information of cessation of business. (Trib. Roma, 7 July 1991, in Dir. inf., 1992, 71). Case law has also come out in favour of holding that "In matters of liability for damages arising from having placed trust in the accuracy of information received, no subjective right can be identified to the correctness of the information requested, but only a legally protected interest not to have one's intention altered or corrupted by a third party's wilfully false or blameworthy action, an interest falling within the scope of art. 1439, para 2 c. c. and protected by aquiline liability only in consequence of a judgment of comparison with the opposed interest of the person acting. In any case, within the scope of banking relations, the rules of transparency and fair management of credit require the banker, where he considers, or is bound to, supply information, he may not supply incorrect information; otherwise he must be liable according to art. 2043 of the Civil Code for the damages wrongfully caused." (Cass. 9 June 1998, n. 5659, in Giust. civ. Mass., 1998, 1249, and in Danno e resp., 1998, 1048).

<sup>1348</sup> Apart from the observation that in the scientific field it is very risky and almost impossible to affirm exactly what is the truth, case law considers in particular art. 33 of the Constitution which rejects the concept of State approved science and prohibits the imposition of set policies or scientific methodologies in the expression of scientific activity and thinking, even in the

whether directly or indirectly acquired, from another technical and scientific source, since for that too there would arise the problem of evaluation of the exactitude. Therefore, the limit to the activity of information which uses its own or third party technical or scientific verification cannot be found in the inability to challenge the results, but in the scientific methodology of enquiry followed,<sup>1349</sup> or else in the scientific reputation of the expert to whom the journalist turns.<sup>1350</sup> Having ascertained the scientific reputation of the source of information, it is legitimate also to publish erroneous technical or scientific data, unless such errors are known and thus are purposely aimed at the damage of others or recognisable by the journalist of an average professional standard.<sup>1351</sup>

**377. Commercial information** In the field of commercial relations, one can distinguish cases in which the information is examined by professionals and cases in which information is furnished by professionals to consumers. The latter case will be dealt with later. As for the former, one can identify certain factual situations: (a) The case of information supplied by a professional who runs an information business. The Court of Cassation<sup>1352</sup> has stressed that “organisation which undertakes the task of supplying commercial information bears a liability for damages caused to third parties pursuant to Art. 2043 of the Civil Code wherever, even without making criticisms or negative judgments on the character of the person (physical or corporate) about which it is supplying that information, it reports a factual situation which does not correspond to the truth, constituting a divergence between the real situation and that resulting from the information as a breach of the ordinary rules of care and diligence necessary for the search for the source of information.” (b) The case in which the supplier of information has a particular qualification. It is considered that “the disclosure of false or inexact commercial information may give rise to civil liability even on the basis of merely negligent conduct, wherever it occurs within the scope of a commercial or business relationship on the part of a person who, by reason of his subjective or professional qualities or through previous relations with the person informed, may be in a position to engender a reasonable trust and may have power of control over the information given. The news supplied should be precise and unequivocal, characterised by a high degree of empirical verifiability. Lastly there must be a diagnostic causal connection between the information rendered and damage occasioned. Therefore, generic information concerning the honesty and propriety of the debtor is not sufficient to complete the causal link between conduct of the informer and the loss occasioned by breach of the debtor which is necessary in order for liability to arise pursuant to Art. 2043 of the Civil Code on the part of the informer towards the informed person.”<sup>1353</sup> (c) The case in which the information is generic. The

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manner of disclosure, unless it is for the protection of overwhelming constitutionally guaranteed interests.

<sup>1349</sup> Cf. Cass. 15 February 1968, n. 542, cit.

<sup>1350</sup> Cf. CA Milan 16 October 1973, in Rep. foro it., 1974, entry Responsabilità civile, n. 139.

<sup>1351</sup> Cf. Pret. Roma, 19 May 1971, in Dir. radio diff., 1971, 528; Trib. Roma, 26 April 1978, in Rep. foro it., 1979, entry Responsabilità civile, n. 73.

<sup>1352</sup> Cf. Cass. 6 January 1984, n. 94, in Giust. civ. mass., 1984, fasc. 1.

<sup>1353</sup> Cf. Pret. Tolmezzo, 2 August 1997, in Giur. merito, 1998, 6.

regime of liability thus varies according to the circumstances characterising the role of those involved and the content and method of the information.

**378. Compilation of lists, guides, directories and opinion polls** Even the compilation of lists, guides, directories and so forth which prove to be incomplete may involve liability of the person who is bound to offer a complete information service. As regards the telephone service, the special regulations<sup>1354</sup> exclude liability of the concessionaire company in the event of errors or omissions of numbers, names, qualifications, titles, addresses etc. in the publication of the official list of telephone subscribers. The regulations do not however exempt the company from liability in the case of failure to insert the user in the list.<sup>1355</sup> The question however remains controversial, involving the debate as to whether the liability in question has a contractual or extra-contractual nature.<sup>1356</sup> An example of the complexity of the problems in a technologically advanced society is the liability arising from the publication of information obtained through the conduct of public opinion polls.<sup>1357</sup>

(ii) Information between the parties

**379. Civil liability for communication of inaccurate information between the parties** The problem of civil liability for circulation of information between the parties becomes ever more difficult to analyse in certain sectors between contractual and non-contractual liability. In particular, within the scope of liability for circulation of inexact information, or misinformation, the typical cases which recur in almost all jurisdictions are characterised by three fundamental factors. In the first place, the inexact information is supplied by a “specialist” in the conduct of his professional and/or commercial activity, and therefore benefits from particular credit and gives rise to a legitimate expectation of their reliability.<sup>1358</sup> Secondly, the supplier of the information is aware, or ought in any case to be aware, of the fact that the person informed will rely upon the information supplied for the purposes of taking important commercial decisions. Thirdly, there must be a direct contact between the parties, even if the informer is not subject to any particular obligation to inform.<sup>1359</sup> Wherever all these factors occur, the information supplied by the informer to the informed must be correct in order not to constitute a civil wrong which may give rise to liability on the part of the person who supplies the inexact

<sup>1354</sup> Cf. art. 25, para. 3, of the regulation for telephone service, approved by Ministerial Decree 11 November 1930.

<sup>1355</sup> Cf. Cass. 15 July 1980, n. 4537, in *Foro it.*, 1981, I, 122.

<sup>1356</sup> Cf. Cass. 27 February 1979, n. 1269, in *Foro it.*, 1979, I, 2912.

<sup>1357</sup> Cf. *Zencovich*, in *Resp. civ. e prev.*, 1984, 291.

<sup>1358</sup> When the information is supplied “privately” on the other hand, the situation is generally different. National laws usually provide that in such case the intention to harm or at least blameworthy negligence in the supply of certain information is necessary. (cf. § 1300 p. 2 ABGB; Art. 729 Greek CC; Art. 485 sec. 1 Port. CC; Art. 2043 Italian cod. civ.; etc.).

<sup>1359</sup> If the duty of information were required in the contract, clearly its breach would squarely give rise to contractual liability. Cf. *von Bar*, *The Common European Law of Torts I* (1998) 516 et seq.

information. The most frequent and well known case of this type of liability relates to the supply of inexact information concerning the reliability of a particular person by a bank or other similar institution.<sup>1360</sup> The situation may be illustrated as follows. X wishes to deal with Y, but is not certain about the solvency or economic reliability of Y. So X contacts Y's bank, requesting information concerning Y. If the bank erroneously replies with a positive opinion, it is liable for any loss caused to X by the lack of solvency or economic reliability of Y.<sup>1361</sup> Another example is of a bank which pays a cheque, after receiving incorrect information concerning the coverage for the cheque from the drawer's bank.<sup>1362</sup> In such a case, the latter bank will be liable to the former. Apart from the banking and credit sector, there are other situations which give rise to this type of liability. This could be the case of a person who receives incorrect information concerning the state of a pension or insurance policy from the insurer or an agent who operates professionally in the field of pensions and insurance.<sup>1363</sup> Or else, there is the person who assigns a debt on the basis of incorrect information concerning the nature of it; or again, when a real estate agent wrongly assures the potential purchaser that the property under examination is free of any type of charge,<sup>1364</sup> or when a person interested in purchasing goods or services asks the person previously appointed by the seller to value the goods or services, whether the valuation is still valid, and receives an erroneous reply of confirmation.<sup>1365</sup>

**380. Information within the scope of the informer's professional business** In all such cases, the information supplied may be connected to the professional activity of the informer, and therefore benefits from particular reliability and an obvious commercial purpose. Thus, the informer is necessarily aware of the fact that the person informed will place reliance upon the information supplied<sup>1366</sup> for the purposes of taking significant economic decisions. Consequently, the supplier of the information must assume responsibility for the losses which his erroneous information may cause to the person informed, unless there exists either a good reason or an exclusion clause of liability.<sup>1367</sup> So, the person requested for information in such a case must avoid supplying incorrect information or that of which he is uncertain, if he is not to become liable for any damages arising from

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<sup>1360</sup> For a more detailed analysis of this case, we refer to the following paragraphs of this report.

<sup>1361</sup> Cf. CA Milan 14 March 1986, in *La responsabilità*, entry *Responsabilità civile – Banca*, 136, 113; *von Bar*, *The Common European Law of Torts I* (1998) 517, no. 536.

<sup>1362</sup> Cf. Cass. 10 April 1961, n. 762, in *BBTC*, 1961, 171, note *Buttaro*; Cass. 30. 10. 1963, n. 2909, in *BBTC*, 1963, 500, note *Bile*; Cass. 13 January 1993, n. 343, in *Resp. civ. e prev.*, 193, 808.

<sup>1363</sup> Cf. Cass. 22 March 2001, n. 4126, in *Contratti*, 2001, 885, note *Radice*; Cass. 19 April 1991, in *Giust. pen.*, 1992, II, 173; *von Bar*, *The Common European Law of Torts I* (1998) 517 et seq.

<sup>1364</sup> Cf. Cass. 16 December 1992.

<sup>1365</sup> Cf. *von Bar*, *The Common European Law of Torts I* (1998) 518.

<sup>1366</sup> Cf. *von Bar*, *The Common European Law of Torts I* (1998) 518.

<sup>1367</sup> The relationship between clauses exempting liability and liability for giving false information has not yet been properly clarified. However, it seems tenable that wherever this type of liability is expressly excluded, there is no remaining margin of protection. Cf. *von Bar*, *The Common European Law of Torts I* (1998) 518, para 548.

it.<sup>1368</sup> Indeed, where ever he supplies the information requested, he voluntarily assumes responsibility for the consequences resulting from the information supplied.

**381. Information, civil liability and contractual liability** The matters just considered bring attention to the crucial point of the question. The fact that there has been a voluntary assumption of responsibility emphasises the problem previously explained on the distinction between civil liability and contractual liability. In the cases mentioned above, it may not in fact be easy to place a precise limit between the obligation to inform and the general principle of diligence and care in civil liability. When a long and stable business relationship exists between informer and informed, this same relationship becomes the origin of a contractual duty of diligence and care, even when the information is outside any type of express contractual provision. On the other hand, when there is only an intermittent business relationship, this will not normally be considered sufficient to give rise to contractual duties of diligence and care outside the scope of the obligations manifest in the contract, but such duties may however be founded in civil liability<sup>1369</sup> (that is, in the so called *culpa in contrahendo*).<sup>1370</sup> Indeed, it has been decided that “a person who having engaged in contractual negotiations will be liable extra-contractually where as third party he supplies one of the intending contractual parties incorrect information on the commercial reliability of the other, vitiating the process of formation of the contractual will”,<sup>1371</sup> similarly, “to proceed with negotiations up to the establishment of all the essential aspects of the contract must be considered contrary to good faith, where done without informing the other contracting party of the first party’s own intention to make the will to contract subject to a completely extraneous fact, such as the consent or favourable opinion of a third party outside the negotiations”.<sup>1372</sup> From the observations just made, it is contended that, viewed in this way, the distinction between contract and civil liability is not so clear; the contract would be only a form of contact between persons, governed by the rules of contract and the legal system, not dissimilar to other non-contractual circumstances which can give rise to reciprocal obligations of care and diligence.<sup>1373</sup> Indeed, it is held that the doctrine of concurrence between civil liability and contractual liability has conquered ground thanks to the development of civil liability for the circulation of incorrect information.<sup>1374</sup>

**382. Culpa in contrahendo and duties to inform** The so called *culpa in contrahendo* or pre-contractual liability is often based, in the line of many court decisions,<sup>1375</sup> on the

<sup>1368</sup> Cf. *von Bar*, *The Common European Law of Torts I* (1998) 518, para 547.

<sup>1369</sup> Cf. *Busnelli*, *Saggi*, 1990, 539-541; *von Bar*, *The Common European Law of Torts I* (1998) 519, para 555.

<sup>1370</sup> Cf. *von Bar*, *The Common European Law of Torts I* (1998) 519, para 556.

<sup>1371</sup> Cf. *Pret. Tolmezzo*, 2 August 1997, in *Danno e resp.*, 1998, 85, note *Laghezza*.

<sup>1372</sup> Cf. *Trib. Udine*, 22 April 1996, in *Resp. civ. e prev.*, 1996, 985, note *Bastianon*.

<sup>1373</sup> Cf. *von Bar*, *The Common European Law of Torts I* (1998) 520.

<sup>1374</sup> Cf. *von Bar*, *The Common European Law of Torts I* (1998) 442 et seq.

<sup>1375</sup> Case law is clear in considering this type of liability as having an extra-contractual nature. (Cass. 30 August 1995, n. 9157; Cass. 11 May 1990, n. 4051, in *CG*, 1990, 832, note *Carbone*; Cass. 17.3.1950, in *Riv. dir. comm.*, 1951, II, 86, note *Sacco*; Cass. 5 May 1956, in *Riv. dir.*

violation of obligations of information between the parties. In particular, one can recall a decision of the Court of Cassation which ruled that “the obligation to comply with good faith, which must rule the behaviour of the parties in the course of their negotiations (Art. 1337 CC) takes substantial form above all from the duty of co-operation and information, for the convergent purpose of the execution of the contract, which must be identified and assessed in relation to the situation in question. Consequently, in the event of rescission by one of the parties from the negotiations, it is necessary to evaluate the position and the behaviour of both the parties in order to establish whether the rescission should be seen as an unlawful abuse by the party withdrawing for having exercised it on grounds of conditions blocking the signature of the award, which were already known to him or recognisable using ordinary diligence, or else may or may not have been determined by conduct of the other party occurring in such circumstances, ruling out the existence of a pre-contractual liability of the withdrawing party”.<sup>1376</sup> Still on the subject, the Supreme Court has maintained that “In the phase prior to the stipulation of a contract, the parties have at any time full liberty to assess whether it is appropriate to conclude the contract and to request everything which they consider opportune in relation to the content of the reciprocal and future obligations, with a consequent freedom, for each of them, to withdraw from the negotiations independently of the existence of a justified ground, with the sole limit of respect of the principle of good faith and propriety, to be understood amongst other things as the duty of information between the parties concerning the real likelihood of conclusion of the contract, without omitting significant circumstances in relation to the viability of the contract itself”.<sup>1377</sup> In any case, “[f]rom the rule of Art. 1337 CC, relating to negotiations and pre-contractual liability, or from certain information requirements (Articles 1338 and 1982 CC) it may not be deduced, consistently with the rules for commercial propriety according to good faith, that each contracting party must elaborate to the other party its own economic situation – unless that is expressly provided for by the contract, or derives from law, as in banking relations – however critical, thus nullifying the responsibility of prudence which each contracting party must assume prior to initiating a relationship of obligations”.<sup>1378</sup> One therefore needs to consider that the duty to conduct oneself in accordance with good faith and the duty to give the other party information relating to the subject of the contract *in fieri*, are necessarily related to each other. However, the fundamental problem is that of fixing limits to the obligation of disclosure

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comm., 1956, II, 360, note *Mengoni*); academic writers are however divided between opposite opinions: those who consider that pre-contractual liability may have a contractual nature (*De Cupis, Granata, Turco, Di Staso, Scognamiglio, Greco, Mengoni, Romano*), and those who consider that it is extra-contractual (*Sacco, De Nova, Bianca, Carresi, Loi, Tessitore, Vigotti, Dell'Acquila*).

<sup>1376</sup> Cf. Cass. 29 November 1985, n. 5920, in *Giust. civ. Mass.*, 1985, fasc. 11.

<sup>1377</sup> Cf. Cass. 29 May 1998, n. 5297, in *Giust. civ. mass.*, 1998, 1159.

<sup>1378</sup> Cf. Cass. 11 October 1994, n. 8295, in *Giust. civ. mass.*, 1994, 1214.

of information between the parties in negotiation.<sup>1379</sup> The growth of provisions intended to safeguard the less informed contracting party created by legislation of Community inspiration only increases for the partners to the negotiation the legitimate expectation of transparency in contracts, and even more so prior to concluding them. Probably a fundamental step in order to be faithful to these requirements is to adopt the concept of fraud by omission and make it operate jointly with Art. 1337 of the Civil Code.

**383. Fraud by omission** Fraud by omission takes place when certain facts are deliberately hidden which, if known, would have induced the contracting party to undertake obligations in a different manner, or not to bind itself. The silence itself is not equivalent to fraud,<sup>1380</sup> other than in the case in which there has been a hiding of true facts, or an explicit obligation of information imposed by the law<sup>1381</sup> has been violated. There is however Art. 1337 of the Civil Code which imposes obligations of fair dealing. The Article in question could in some manner be used for the purpose of imposing upon the parties the duty to enlighten each other when ever they actually discover the error of the other party.

**384. Pre-contractual liability and contractual liability** Many Community directives, amongst which for example those relating to door to door contracts, to financial brokerage, to transparency in banking and financial services, intended to govern the relations between lay and professional contracting parties in a different way, bear as a corollary the raising of duties of information between the parties, at least in certain types of contract.<sup>1382</sup> Legislation goes in the same direction in requiring certain third parties to give information for the purposes of allowing a more considered and informed consent to the contracting party. For example, this is the case of the rules relating to the obligation of filing of accounts of companies and the proper certification of the same; of the obligation to publish the municipality's town planning transactions; of the obligation on pharmaceutical and food companies (even when not the direct seller to the consumer) to write the expiry date on a product; the duty to give a truthful prospectus of a company which must be quoted on the stock exchange; the prohibition of misleading advertising,<sup>1383</sup> etc. This tendency has led legal writers to hypothesise that one could arrive at a gradual assimilation between defects in consent (Articles 1427-1440 of the Civil Code), grounds for rescission of the contract (Articles 1447 etc. of the Civil Code), acts performed by persons incapable of intending to enter a contract (Art. 1428 CC) and pre-contractual liability (Articles 1337-1338 CC),<sup>1384</sup> thus between aspects of civil liability and aspects

<sup>1379</sup> Cf. *Musy*, entry «Responsabilità precontrattuale», in *Digesto delle discipline privatistiche*, Turin, 1999, vol. XVII, 405 et seq.

<sup>1380</sup> That silence could amount to fraud was the opinion of the Trib. Verona, 18 November 1946, in *FP*, 1947, 199.

<sup>1381</sup> The civil code for example requires an express obligation of information at arts. 1892-1893, relating to insurance policies.

<sup>1382</sup> Cf. *Musy*, entry «Responsabilità precontrattuale», in *Digesto delle discipline privatistiche*, Turin, 1999, vol. XVII, 408, no. 135-136.

<sup>1383</sup> *Ibid.*, 408, no. 137-139.

<sup>1384</sup> Cf. *Roppo*, *Il Contratto* (1977) 202; *Mirabelli*, *Dei contratti in generale*, in *Commentario cod.*

of contractual liability.<sup>1385</sup> Finally, one should recall that the combination of principles of case law in favour or against the existence of a given duty of information in pre-contractual relations depends to an important extent on the particular case in question.<sup>1386</sup>

(iii) Information in certain particular cases

(aa) Information between doctor and patient

**385. Informed consent** The principle of consent in relation to medical services and the necessary corollary of the duty to give information have established an ever wider space over the last years in the development of theory and case law in Italy.<sup>1387</sup>

**386. The freedom of self determination in relation to medical treatment** Constitutional Court Judgment no 471 of 1990 appears fundamental. Though dealing with a problem completely extraneous to the doctor/patient relationship, it established for the first time that “personal freedom” in the meaning of Art. 13 of the Constitution also includes the freedom for the individual to dispose of his own body.<sup>1388</sup> Equally decisive was the famous Judgment in the case of *Massimo*,<sup>1389</sup> which established that the right of each person to arrange for his own health and personal well-being must include the right to refuse

civ (1958) 88; *Vettori*, Anomalia e tutela dei rapporti di distribuzione tra le imprese (1983) 98-148; *Sacco e De Nova*, Obbligazioni e contratti, in *Trattato Rescigno*, 1992, I, 428; *Mattei*, Errore (Sintesi di informazione), in *Riv. dir. Civ.* 1988, 653.

<sup>1385</sup> According to the same theory, the *Banca Manusardi* case, resolved by the Corte di Appello di Milano, represents confirmation of the development just proposed. This judgment indeed has approved extension of the pre-contractual duty of good faith to information and the use of pre-contractual liability where there is also a valid contract. The judges affirmed without hesitation that the liability for a prospectus falls into the area of *culpa in contrahendo*, and is subject to the rules themselves of pre-contractual liability (CA Milan 2 February 1990, in *Giur. it.*, 1992, I, 2, 49; in *Resp. civ. e prev.*, 91, 116; in *Giur. comm.*, 1990, II, 734).

<sup>1386</sup> Cf. *Musy*, *op.cit.*, 392 et seq.

<sup>1387</sup> Amongst the most recent contributions on the subject, v. L. *Bellanova*, Il dovere di informare: una nuova frontiera della responsabilità del medico?, in *Resp. civ. e prev.*, 2000, 163; E. *Calò*, Anomia e responsabilità nel consenso al trattamento medico, *ibidem*, 1220; R. *De Matteis*, La colpa professionale, in I precedenti. La formazione giurisprudenziale del diritto civile, *Giurisprudenza sistematica di diritto civile e commerciale*, founded by Bigiavi, edited by G. *Alpa*, II, Turin, 2000, 1120 et seq.; A. *Fiori*, G. *La Monaca*, L'informazione al paziente ai fini del consenso: senza più limiti, in *Riv. it. med. leg.*, 2000, 1302; P. *Stanzione*, V. *Zambrano*, Attività sanitaria e responsabilità civile, Milan, 1998, 257; A. *Santosuosso*, Il consenso informato (1996).

<sup>1388</sup> Corte Cost. 22 October 1990, n. 471, in *Foro it.*, 1991, I, 14, by which the Constitutional illegitimacy of art. 696, para. 1, c. p. c. was declared, in that it did not permit arranging a prior technical assessment on the person of the petitioner.

<sup>1389</sup> Cass. pen., 21 April 1992, in *Rep. Foro it.*, 1993, entry “Omicidio e lesioni colpose”, n. 17. This is also recalled in the recent Cass. pen., 9 March 2001, in *Foro it.*, 2001, II, 591.

medical care, allowing the illness to take its course, even to the most extreme consequences, this being a choice which concerned the quality of life.<sup>1390</sup>

**387. Personal freedom of the patient; the duty to inform and its limits** Medical activity is justified not so much on the consent of the person lawfully entitled to do so (Art. 51 of the Penal Code) which would often encounter the obstacle set forth in Art. 5 of the Civil Code, as in the service performed with respect for the personal freedom of the patient, to safeguard a constitutionally guaranteed value, other than in certain exceptional cases.<sup>1391</sup> On the latter point, the jurisprudence affirms that “the obligation (to inform) extends to foreseeable risks and not also to anomalous results, at the limits of fortuitousness, which do not assume significance according to the *id quod plerumque accidit*. This is because one cannot ignore that the medical worker must balance the requirements of information with the need to avoid that the patient, for what ever extremely remote possibility, should fail to submit even to a routine operation.

**388. The nature of the consent** In evaluation of the characteristics of the particular case, however, there are numerous decisions which have submitted the choice of the medical team to act “in the best interest of the patient” to a rigorous critical analysis where these have simply accepted the consent of a spouse.<sup>1392</sup>

**389. The purpose of medical information** Whilst underlining that consent is only such, if properly informed, the judges distinguish between technical choices reserved for the doctor and existential choices reserved for the patient, stipulating that even for the latter the content of the information obligation which is variable in relation to the “nature and urgency of the operation, and the physical conditions and degree of understanding of the patient”. Lastly, even the status of the hospital equipment where the doctor works has been considered as part of the information which the professional should supply to the patient, in order that the latter may not only decide whether to undergo the operation or not, but also whether to do it in that hospital or in another.<sup>1393</sup>

<sup>1390</sup> For a reconstruction of the affair, refer to *Santosuosso*, Dalla salute pubblica all'autodeterminazione: il percorso del diritto alla salute, in *M. Barni, A. Santosuosso*, edited by *Medicina e diritto* (1995) 95.

<sup>1391</sup> For the connection between arts. 13 e 32 Cost. e 5 c.c., v. *M. Bessone, G. Ferrando*, entry “Persona fisica”, in *Enc. dir.*, XXXIII (1983) 193.

<sup>1392</sup> Amongst these, a recent judgment of the Milan judges merits particular attention (case *R.C. e altri c. Ospedale S. Raffaele*), where it is stated: “a member of the patient’s family, although he may have a greater closeness to the patient compared with the doctor, cannot rise to the position of *nuncius* of the patient’s will, if the latter is capable of intent and will,” (Trib. Milan 14 May 1998, in *Resp. civ. e prev.*, 1999, 487, note *M. Gorgoni*, La “stagione” del consenso e dell’informazione: strumenti di realizzazione del diritto alla salute e di quello all’autodeterminazione. In the same terms: Trib. Milan 4 december 1997, in *Giur. it.*, 1999, I, 1, 313). See also *E. Calò*, Il consenso del terzo al trattamento medico, in *Danno e resp.*, 1999, 860.

<sup>1393</sup> *Cass.civ.*, 16 May 2000, n. 6318, in *Danno e resp.*, 2001, 154, with note by *G. Cassano*, Obbligo di informazione, relazione medico-paziente, difficoltà della prestazione e concorso di responsabilità.

**390. Liability for breach of the medical duty to inform** Consequently, infringement of the freedom of self-determination by the patient would represent, independently of the result of the medical treatment in respect of which there has not been consent, an injury to personal freedom, susceptible to compensation in accordance with the principle of *neminem laedere* set forth in Art. 2043 CC.<sup>1394</sup> One should however caution that the theory which places breach of obligations of information in the main riverbed of contract is overwhelmingly preferred.<sup>1395</sup> This occurs particularly in an environment – that of cosmetic surgery – where the duty of information takes the guise of an additional obligation as part of the fulfilment of the medical service.<sup>1396</sup> Thus the service can be valued in respect of the “capacity to deliver an effective improvement to the physical aspect”<sup>1397</sup> as duly promised by the doctor.

**391. The chain of causation** For the establishment of a chain of causation, the court does not require proof that, if correctly informed, the patient would have refused the operation. It considers sufficient that there was an effective scope for choice by the patient and lack of information by the doctor. According to the judges, the breach of the duty of information results not just from violation of the patient’s right of self determination, but also injury causally linked with the surgical operation, even if performed correctly, and this because the person concerned was not put in a position to evaluate with full awareness the desirability or otherwise of undergoing the operation.<sup>1398</sup>

**392. Medical information and culpa in contrahendo** Recently there has appeared on the scene of jurisprudence a theory intended to maintain that the breach of the obligation of information would also include a case of *culpa in contrahendo*, upon the basis that the formation of the contract for the undertaking of work occurs only when the patient manifests a will to be submitted to the treatment. Thus, the liability of the doctor who omitted to inform the client of all the possible outcomes of the operation would be within the scope of Art. 1337 CC.<sup>1399</sup> It has been held that the “obligation of information by the medical worker assumes importance in the pre-contractual phase, in which is formed the consent of the patient to treatment or operation is, and is founded in the duty

<sup>1394</sup> Lately: Cass. 24 September 1997, n. 9374, cit.

<sup>1395</sup> V. *inter al.*: Cass.civ., 12 June 1982, n. 3604, in Giust. civ., 1983, I, 938; Cass.civ., 26 March 1981, n. 1773, in Arch. civ., 1981, 544; Cass. 29 March 1976, n. 1132, in Giur. it., 1977, I, 2, 1980; Cass.civ., 18 June 1975, n. 2439, in *Giur. it.*, 1976, I, 1, 953. For a review of opinions: A. Palmieri, *Relazione medico-paziente tra consenso «globale» e responsabilità del professionista*, in *Foro it.*, 1997, I, 772.

<sup>1396</sup> In these terms: R. De Matteis, *La responsabilità medica. Un sottosistema della responsabilità civile* (1995) 67.

<sup>1397</sup> Cass. 8 August 1985, n. 4394, in *Foro it.*, 1986, I, 121.

<sup>1398</sup> With the meaning though: “The surgeon though does not have any liability for omitting to inform a patient about the risk of a pathology occurring, which then happened during the surgical operation, wherever the chain of causation is determined by an anomaly of the patient not previously discoverable.” v. Trib. Milan 18 November 1999, in *Gius*, 2001, 521.

<sup>1399</sup> In theory, refer to M. Costanza, *Informazione del paziente e responsabilità del medico*, in *Giust. civ.*, 1986, I, 1432.

to conduct oneself in accordance with good faith in the development of negotiations and the formation of the contract".<sup>1400</sup>

**393. The burden of proof** From the aspect of the allocation of the burden of proof, one can trace an explicit stance of the Court of Cassation that it is for the patient to demonstrate that he did not receive the necessary information in order to direct his own decision properly.<sup>1401</sup> The circumstance, according to the judges, would be dictated by the application of general principles relating to breach, with the consequence that the "objective difficulty found by a party in supplying proof of the fact constituting the lawful claim alleged may not lead to a diverse allocation of the onus of proof". However, there is no lack of opportunity for making evaluations on a presumptive basis; this is the case of a recent judgment which used the size of the resulting scars from a cosmetic surgery operation as a presumption of the lack of complete information to the patient in that respect<sup>1402</sup>.

**(bb) Information and liability of the producer or retailer: protection of the consumer**

**394. Information and liability of the producer** The liability of the producer has become a classic topic in the sector of civil liability, even if this expression, with the terminology which accompanies it, is relatively recent, going back to its first use only in the beginning of the 1960s.<sup>1403</sup> The various formulae used to label the theme (liability of the manufacturer, liability for defective products, liability of the business towards consumers) may be considered today as approved following the introduction of the Community directive of the 25<sup>th</sup> July 1985, implemented in the Italian system by the Presidential Decree of 24<sup>th</sup> May 1988, number 224, entitled "implementation of EEC directive number 85/374 relating to the approximation of law relating to damage from defective products pursuant to Art. 15 of the law number 183 of the 16<sup>th</sup> April 1987".<sup>1404</sup> The text of the directive makes no distinction between products or between types of defect (save as set forth by Art. 6.F) whether originating from the producers of prime materials and

<sup>1400</sup> Cass. 15 January 1997, n. 364, cit.; the Cass. expressed itself in similar terms, 8 April 1997, n. 3046, cit.

<sup>1401</sup> Cass. 25 November 1994, n. 10014, in *Foro it.*, 1995, I, 2913, which confirms CA Milan 30 April 1991, *ivi*, 1991, I, 2855.

<sup>1402</sup> Cass. 6 October 1997, n. 9705, in *Giur. it.*, 1998, II, 1816, with note by *Pizzetti*, *Chirurgia estetica e responsabilità medica*. See also *Nannini*, *Il consenso al trattamento medico* (1989) 126.

<sup>1403</sup> On this subject, one may refer to a decision of the judge of the merits in 1976 (*Tribunale S. Maria Capua V.*, 10 December 1976, in *Rass. Dir. civ.*, 1985, 790) in which it is pointed out how "the producer's placing on the market of harmful products may amount simultaneously to a case of contractual liability and civil liability. From that may in fact arise both damages linked to breach of contract and damages arising from violation of the general rules of aquiline responsibility. The promise of quality made on the back of a product pack in the event of its inefficacy grounds an action under art. 1497 c. c. The lack of indication of the manner of use of the product in adverse climatic conditions gives rise to liability under art. 2043c. c."

<sup>1404</sup> Cf. *Alpa*, *Responsabilità civile* (2003) 175 et seq.

component parts, or from assemblers. It makes no distinction between the users of the products or between the manner in which the damage is manifested. It does distinguish private use or consumption of the product only for the purposes of quantification of damages caused to things, but not for persons (Art. 11.B). By virtue of the provision of Art. 15, the general rules of liability for blame remain intact in cases where the special law does not apply and also the regime of presumed liability consequent upon exercise of certain activities (dangerous activities, Art. 2050 CC; construction of automobiles, Art. 2054 CC) where the production of goods falls within these provisions. Actions founded on contractual liability and on guarantees for defects remain unchanged, as do actions against persons who do not have the quality of producer, importer or supplier.

**395. Notions of product, producer and defect** Art. 2 defines “Product”, arts. 3 and 4 deal with the “Producer”, whilst art. 5 explains the notion of “Defect”. The definition of “defectiveness” with reference to the legitimate expectations of public safety, has undoubtedly significance and effect which can be considered comprehensive in comparison with the traditionally familiar definition of defectiveness referred to the cause of the possible defects. This defectiveness is then further defined in terms of *manufacture* in the strict sense, of *construction* or of *information*.<sup>1405</sup> This distinction retains important only from the point of view of proof. The proof is both in relation to the defect, where resort to presumptions assumes a different importance according to the category of defect analysed, and in relation to an important, but not explicitly mentioned, circumstance against which the legitimate expectation of safety can be measured. In particular, there is the “state of the art”, which has different connotations, according to whether the defect is of manufacture, construction or information.

**396. The manufacturer’s duty to inform** In particular, with respect to the information given by the manufacturer one should refer to art. 5.a.ii. of the Presidential Decree. The more and the better informed the user is on the correct use and characteristics of the product, the safer it will be considered. The legitimate expectation of safety refers also to the free availability of all the information. The awareness thus created in the user, allowing safe use of the product, not only sets the standard for the manufacturer’s duty of care, but moreover constitutes a benchmark for evaluation of the acceptability of risk.<sup>1406</sup> Indeed, correct and complete information may neutralise, for the purposes of actual use of the product, the intrinsic danger of certain of its characteristics: one need only think of the warnings of side-effects of medicines. The same function is performed by the wide availability of information, that is the existence of obvious characteristics, referred to in the law. On the one hand, this factor measures the degree of *contributory negligence* of the user who may have ignored its more obvious characteristics; on the other, it helps to measure the acceptability of the risk of use of the product itself.<sup>1407</sup> This

<sup>1405</sup> Cf. Cf. *Carnovali*, La responsabilità del produttore (1974) 30 et seq.; *Alpa*, La responsabilità del produttore nei progetti comunitari, in *Danno da prodotti e responsabilità dell’impresa* (1980) 356; *Alpa*, La responsabilità del costruttore per vizi e difetti dell’autoveicolo, in *Arch. giur. circolazione e sinistri* 1979, 247.

<sup>1406</sup> Cf. *Relazione al progetto di decreto legislativo* of the Trimarchi Commission, par. 4, 4.

<sup>1407</sup> Cf. *Alpa*, cit., 588.

is a risk determined in practical terms by the availability of widespread understanding and consequently neutralising precautions. The Presidential Decree with its reference to knowledge of conditions for use which contribute to the safety of the product, as well as assisting in establishing the degree of legitimate reasonableness of expectations of safety, also implicitly introduces comparative risk benefit analysis as a further criterion for product risk assessment. Assuming that it would be unreasonable to expect total safety, the effective degree of lack of safety, or defectiveness, is determined also in terms of the user's effective capacity to know of the risks connected with the use of the product. Using either information supplied or that which is widely known, he can compare products with reliable benefit. To assess the sufficiency of the information and the appropriateness of the safety expectations, one must refer to the circumstances set forth in art. 5, at (b) and (c). Information which fails to refer to probable use or reasonably foreseeable use will not be adequate. Similarly, adequacy of information supplied must be assessed in relation to the time of placing the product on the market. The principle of art. 6 (e) should be recalled by analogy. The producer is not liable for omission of information which, at the time of placing on the market, did not appear to have any safety significance. This is so, of course, only for harmful events occurring before the knowledge became objectively available. One can consider that the principle contained in the penultimate paragraph of art. 5 is not valid for defects in information. Failure to indicate information and warnings, which are significant for safety and part of "scientific and technical knowledge" available at the time of placing on the market, can never be excused. This is because these are elements whose availability is not conditioned by the market, being mere information, as opposed to production standards. Information to the public by a pharmaceutical producer on all side effects and warnings given by other producers thus appears to be a legitimate expectation. Any such comparative deficiency could render the inadequately described product *ipso facto* defective.<sup>1408</sup>

**397. Improper use of the product and instructions** It is interesting to note a judgment of the Florence Court<sup>1409</sup> and an arbitration award,<sup>1410</sup> both arising out of the lack of

<sup>1408</sup> Cf. misc., La responsabilità per danno da prodotti difettosi (1990) 51.

<sup>1409</sup> In opening a bottle of orangeade, a woman was wounded in the eye by the explosion of the top. Blaming the incident on a defect of closing of the bottle, the consumer sued the supermarket where she had purchased the drink. The supermarket in turn called into the action the producer of the orangeade. From the technical opinions there emerged that the explosion was due to a combination of two unorthodox actions on the part of the plaintiff: that is to say, the cutting of the top with a knife, accompanied by a forced leverage off from bottom to top. In the opinion of the judges these were operations contrary to the most elementary rules of prudence, which must be adapted in handling gassed drinks bottled at high pressure. The injury was blamed on the exclusive fault of the plaintiff. The aspect of the decision that must be particularly underlined concerns the conclusions of the judges on the lack of instructions about the method of opening the bottle. The Court held that information of this type did not appear necessary, since the structure of the top and its shape made it obvious that it should have been opened by one or two turns around the threading. (Trib. Firenze, 9 April 1991, in Resp. civ. e prev., 1992, 449).

<sup>1410</sup> It happened that a kettle, forgotten on the stove, ejected together with the top a spurt of

instructions on harmful products. The concept of lack of safety considered in these decisions shows that it takes account only of normal use of the product. It is still possible to report a recent judgment of the Rome Court<sup>1411</sup> which ruled that the producer had no obligation of information (pursuant to art. 2043 CC) concerning possible dangers arising from the product, in the absence of a specific provision and in the event that the product was not intrinsically dangerous in normal use, and provided that the user has been placed in a position to realise for himself the possibility of any harmful consequences linked with a given use.

**398. Instructions, warnings and toys** The problem of the instructions and warnings to be included and attached to toys is of particular relevance when considered in relation to the requirements of protection and to the physical and psychological characteristics needed for the type of consumer. Such indications should all be understood as being directed solely at the parents or the guardians, at least in the majority of cases. As for the child, it is obviously unreasonable to expect a very young minor meticulously to follow the manufacturer's instructions for the use of a toy (even if we were to assume the child could read). Proof that the object was put to a different use from that intended by the manufacturer in instructions will not be considered a valid excuse in discharging any liability where the actual use of the object was foreseeable with reference to the environment and skills even of a precocious and ingenious child, and therefore not a subject to be excluded from the list of instructions.

**399. Recommended age range for users** Naturally, the situation will change as the age bracket of the injured child increases. A particular aspect is the warning concerning the age group for whom the toy is intended. These indications are useful, not only to identify the category of children who intellectually are able to appreciate and understand the toy to its fullest. In the majority of cases, such an instruction will not only be aimed at ensuring the maximum enjoyment of the toy, but also to ensure that a toy, suitable and innocuous to a four year old, will not become harmful in the hands of a baby of a few months or a year. One must therefore ask whether the manufacturer's indication of suitable age group is enough to release the manufacturer from liability for injury caused to a child of a lower age group than that advised. The answer cannot generally be positive: in order to exclude such liability one would have to define all situations which

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boiling water. The purchaser, who had bought the object as part of a supermarket's promotional offer, made his claim for damages against the retailer, which turned out to belong to a chain of shops. The head company of this organisation in turn brought arbitration proceedings against the wholesaler of the kettles. The technical expertise showed the proper functioning of the kettle, within the scope of normal domestic use. This reliability was confirmed by the fact that, of the 135.000 kettles sold, this was the only accident reported. One could therefore assume that the other kettles operated correctly. The product was thus considered as safe, even though lacking any instructions on use. The arbitrators indeed stressed that the average understanding of users of similar products would be such as to lead them to avoid abnormal types of use that could turn out to be a source of injury. (Coll. Arb. Bologna 14 gennaio 1991, in *Rass.dir.civ.*, 1992, note di Berti).

<sup>1411</sup> Cf. Trib. Roma, 11 February 2000, in *Giur. it.*, 2001, 1643, note *Giacchero*.

could occur, the risks incurred, and provide guidelines as to the use of the toy. Only then would the parents be the only ones who could be held responsible in the event of injury.

**400. Labels, instructions and warnings** The Legislative Decree 313/1991 (modified with the Legislative Decree 24 February 1997 n.41) gives precise guidelines as to the instructions and warnings to be set. At Appendix II, para. 3 it is stated that “the labels attached to toys and/or on their containers and on the accompanying instructions for use must be created so as to efficiently capture the attention of the users or of their supervisors and to therefore make them aware of the risks involved in the use of the toy and the way of avoiding such risks”. Other provisions are included in Attachment IV, on the subject of potentially dangerous toys and of products that are inappropriate for children less than thirty-six months old.<sup>1412</sup>

**401. Products dangerous for children** Even if we were not to consider products aimed specifically at children, the consideration that a very young child may be handling a product is very important. Particularly one must consider those products which pose a distinctly greater threat where children use them rather than adults. For example, products that may potentially hide a real threat should instruct users to take particular care. However, it is evident that such behaviour can only be requested of an adult; in order to be out of harm’s way, the child should be simply kept away from these products. The manufacturer must therefore openly announce the hazardousness of the product, possibly with an attached notice for the attention of the parents or guardians to keep the products out of reach of children. It is clear that such a conclusion cannot apply to every kind of product deemed potentially harmful; in some cases (knives, scissors, fire arms, electric irons, etc.) the risks are so clear that any kind of notice from the manufacturer is redundant. Such products have characteristics which cannot in any way give reasonable doubt as to their unsuitability for children. But in the case of products that are not obviously dangerous (such as pharmaceuticals, insecticides, detergents and certain products containing alcohol), it will be found necessary to clearly indicate that the product

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<sup>1412</sup> With reference to these toys, point 1 provides that these must bear a precise warning, complete with a short indication about the specific risks which make the toy unsuitable for children of less than three years. Such an indication may only be omitted for those toys whose functions, dimensions, characteristics or other elements may be such as manifestly to exclude them from use by that age group. Exhibit II. 4 of Legislative Decree 313/1991 provides that toys such as slides, swings, rings, trapezes, ropes and similar toys mounted on a trestle horse must be supplied with warnings for use, recalling attention to the need to carry out periodic checks and maintenance of the essential parts. The notice must state that failure to carry out the maintenance may give rise to risks of a fall or turning over. Exhibit II. 3, 4, 5 and 6 specify the indications and warnings which must be attached to certain types of toy, and more specifically to “functional” toys (i. e. those which have the same functions as apparatus or equipment intended for adults); for chemistry sets (and those containing dangerous substances and preparations); skateboards and roller skates for children; and aquatic toys. Cf. *Cendon and Ziviz*, I prodotti difettosi ed i bambini, in *Cendon* (edited by), *La responsabilità extracontrattuale* (1994) 175 et seq.

is to be kept well out of the reach of children. Wherever one finds that such a notice is absent, the product would be qualified as injurious, giving rise to the manufacturer's duty to compensate the innocent party, at least as a matter of contributory negligence.<sup>1413</sup>

**402. The package travel directive (Directive 90/314/EEC)** Directive 90/314/EEC on package travel, package holidays and package tours sets out, in art. 4, specific duties on information given on behalf of the organiser and/or seller to the consumer. The member states must ensure that these contracts contain as a minimum the clauses indicated in the attachment to the Directive. All such clauses must be expressed in writing and given to the consumer before concluding the contract, a copy of which must also be given to the consumer. Art. 3 of the Directive specifically indicates which information, other than the price, must be indicated in the brochure in a clear, legible, and precise form. The Directive does not include details of any other kind of remedy for breach of the above duties. This aspect is therefore governed by national legislation of each member state. The Legislative Decree 17/03/1995, n. 111, "Enactment of the directive n. 314/90/EEC" established the Directive in Italian Law. Art. 7 of the Decree indicates which elements must be contained in contracts for the sale of holiday packages; art. 8 lists the information, as prescribed in the Directive, that must be made available to the consumer before the contract is concluded; art. 9 describes what is to be contained in any brochures made available to the consumer; art. 12 establishes the conditions necessary in order to modify the contract conditions; art. 14 governs the need for compensation from the organiser and seller in the case of breach or non-performance of contract.

**403. The doorstep selling directive (Directive 85/577/EEC)** Directive 85/577/EEC, on contracts negotiated away from business premises asserts in art. 4 the consumer's right to rescind a contract negotiated outside commercial premises. The seller has a duty to inform the consumer of this right to be exercised within a minimum period of seven days from the moment of receipt of that information, including the name and address of the person to contact for exercise of that right. It is also established that, if the information is not made available, the legislation of each individual member state must provide for the application of appropriate measures to protect the consumer. The Directive in question was implemented in the Italian legal system with the legislative Decree 15/1/1992, no. 50 "Enactment of the Directive n. 85/577/EEC relating to contracts negotiated outside of commercial premises". Art. 5 of the decree specifies the information to be given to the consumer on the right to rescind. As for the manner in which the information is delivered, the Italian law differs from Community law in that it distinguishes between the cases where an order (however described) is submitted to the consumer for signature and cases where this does not happen. Art. 9 of the decree provides, in cases where the contract is negotiated on the basis of offers made to the public through television or other audiovisual medium, that the information on the right to rescind must be specified during the presentation of the product or service, in a

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<sup>1413</sup> Cf. *Cendon and Ziviz*, I prodotti difettosi ed i bambini, in *Cendon* (edited by), *La responsabilità extracontrattuale* (1994) 175 et seq.

manner compatible with the medium used for its promotion. Legislative Decree 50/92 art. 11, lays down the applicable sanctions. Without prejudice to the application of criminal law if a crime has been committed, if the commercial operator fails in his duty to the consumer to make known the aforementioned information, or makes omissions, misrepresentations, or in any way does not conform with the guidelines mentioned above, the applicable administrative sanction is the payment of ten million Lire (€ 5,164). In particularly grave cases, the minimum and maximum limits of the fine are doubled.

**404. The consumer credit directive (Directive 87/102/EEC)** Directive 87/102/EEC concerning consumer credit states in art. 6 that before an agreement between a credit or financial institution and a consumer for the grant of a credit advance on an account (other than a credit card account) is concluded, the consumer must be informed as to the maximum credit limit, the annual interest rate, other additional charges applicable, the conditions under which the terms may be modified, and the conditions for termination. The written contract, with a copy for the consumer, must contain information indicated in arts. 4 and 5 of the Directive 87/102/EEC. Art. 3 specifies that any advertising or offers displayed in the commercial offices of a person disposed to grant a loan or to act as intermediary should be accompanied by a statement of the global annual interest rate. The directive does not give any remedies for the breach of these duties. That aspect is left to national legislation of each member state. Italian law implemented the Directive with the Legislative Decree 25/2/2000 no. 63 entitled "Implementation of the directive 98/7/EC, modifying Directive 87/102/EEC, relating to consumer credit".

**405. Distance selling directive (Directive 97/7/EC)** Directive 97/7/EC on the protection of consumers in respect of distance contracts establishes in art. 4, the specific information the consumer must receive prior to the conclusion of such a contract. The information must be supplied in a clear and comprehensible fashion, by all appropriate means of communication. Particular precaution is to be taken with telephone communications: the identity and the commercial issue under discussion must be made known to the consumer at the beginning of the phone call in an unequivocal fashion. As for the form of the information, art. 5 of the same Directive provides that the consumer must receive written or other accessible, recorded confirmation of the information, prior to signature of the contract, or upon delivery for goods not intended to be delivered to third parties. Other information is listed which must be given to the consumer, for example where to lodge a complaint, or existing commercial guarantees. Art. 11 deals with administrative or judicial proceedings, allowing member states to shift to the supplier the onus of proof of the giving of prior information, of written confirmation, or of respecting the terms and consent by the consumer. Finally, article 16 provides that the member states should adopt appropriate measures to inform the consumer of the national laws implementing the directive, and encourage professional organisations to inform consumers of codes of self-regulation. The Legislative Decree 22/05/1999 no. 185 implementing Directive 97/7/EC has enacted articles 4 and 5 without modifying them (arts. 3 and 4 Legislative decree 185/99). Art. 12 of the above legislative decree states the sanctions: without considering the criminal law aspect, if the supplier violates the laws on the duty to inform the consumer, or if he obstacles the consumer's right to rescind or refuses to reimburse the

consumer, he will be liable for the sum of one to ten million lire (516-5,164 €). In particularly serious cases, the minimum and maximum tariffs may be doubled.

**406. The timeshare directive (Directive 94/47/EC)** Directive 94/47/EC, concerning the protection of the timeshare purchaser, provides at article 3 that national legislation must ensure adequate measures to guarantee that the seller will be under obligation to provide upon request a document containing a general description of the assets and other information specifically indicated in the Directive. Such information must then be incorporated in the contract. Art. 4 defines which information must be contained in the contract. On the basis of art. 5 of the Directive, the member states must provide in their legislation for the possibility that the buyer may wish to rescind the contract within three months following its signature, if the contract itself does not specifically contain the information anticipated by the Directive. If on the expiration of the three month deadline, the buyer has not taken advantage of his right to rescind the contract and if the contract did not include any of the aforementioned information, he has a further ten days to exercise this right, starting from the day after the three month expiration date. Legislative Decree 9/11/1998, no. 427, “enactment of Directive 94/47/EC concerning protection of the buyer for certain contracts to do with the acquisition of a right to the enjoyment for a limited period of real property” has implemented the Directive in the Italian legal system. In relation to the information document, art. 2 of the Legislative Decree 428/98 establishes that the vendor has a duty to issue to every person so requesting a document containing the precise elements of information also indicated in the directive. Art. 3 indicates the elements that must be contained in the contract. Art. 4 provides for seller to be able to use the term “timeshare” (or *multiproprietà*) in the information document, in the contract and the commercial advertising relevant to the real property, but only when the right conveyed is one of real property. In addition the advertising relevant to the real property must refer to the possibility of obtaining the information document, indicating where it is available. Finally, art. 12 establishes that a vendor who contravenes the aforesaid duties will be liable to a fine of Liras 1 million to Liras six million (€ 516-3,099).

**407. The cross-border credit transfers directive (Directive 97/5/EC)** Directive 97/5/EC guarantees the transparency, or openness, of the conditions applicable to transactions, prescribing duties to provide information, both before and after the transaction. As regards the first, art. 3 establishes that the agents must put the information written on the conditions applicable to cross-border transfers at the disposal of their customers, whether actual or potential. Art. 4 lists the information to be supplied to the customers which must be in the same format, unless the latter expressly refuse the document, after the execution or the reception of a transfer. The Directive does not provide any remedies for failure to observe the duties to inform the consumer as discussed above. This aspect is left to be resolved by national legislation of each member state. Implementation of the Directive in Italy was done by Legislative Decree 28/7/2000, no. 253 “Implementation of Directive 97/5/EEC on cross-border transfers”. The decree lists the duties to inform at art. 3, both prior to and following a transfer. The same legislation states that the Interministerial Committee for Credit and Savings (CICR) may, upon proposal from the Banca d'Italia, specify the content of the information given and the information to be

made public in the future. It may also decree other dispositions as to the form, content, and type of advertising and the preservation of documents proving the publication of information. No sanctions are noted in the legislation as regards the breach of the duty to inform on behalf of the supplier.

**408. The e-commerce directive (Directive 2000/31/EC)** Directive 2000/31/EC on electronic commerce lists the general information to be supplied in art. 5. Apart from the other duties to inform established by Community Directives, the member states must provide legislation to ensure that the service provider makes basic information (the name, address and contact details of the provider, and other related information) easily accessible to the recipient of the services and to the relevant competent authorities in a direct and permanent fashion. In cases where the price of the service is referred to, the latter must be indicated in a clear and unequivocal fashion, and must indicate whether the indicated price includes postage costs or taxes. As for commercial communications in connection with e-commerce, member states must, under section 6 of the Directive, ensure that such communications are easily identifiable, including the person responsible. Regarding unsolicited commercial communications sent by e-mail, the Directive states at article 7 that, where admissible, member states must make sure that it is clearly and unequivocally identifiable from the moment the communication is received. Art. 10 of the Directive establishes that apart from the other duties to inform fixed by Community law, member states must make sure that the service provider informs the consumer of at least the basic facts surrounding the concluding phases of the contract, whether the contract is to be stored, the technical measures necessary to find and correct any errors as to data insertion, and the languages that may be used to conclude the contract. The member states must also ensure that the service provider indicates any codes of conduct that may be referred to in the event of breach of a duty, and how to access these over the internet. The general clauses and conditions of the contract proposed to the consumer must be made available to him for storage and copying. The Directive does not state any remedies for the breach of such duties, thus leaving this to each member state to legislate nationally as they see fit. The Directive 2000/31/EC was implemented in Italy by Legislative Decree 9th April 2003 no. 70 named "Implementation of the Directive 2000/31/EC, published in G.U. no. 87, Ordinary Supplement no. 61. Articles 7, 8, 9 and 12 of the Legislative Decree set forth the obligatory general information that is to be given to the consumer, the duties to inform for commercial communication, those for non-solicited commercial communication, and the information directed towards the conclusion of the contract. Art. 12 of the same Legislative Decree establishes that, without prejudice to instances where the act or omission constitutes a crime, violation of articles 7, 8, 9, 10 and 12 is punishable by payment of an administrative pecuniary sanction from 103 € to 10,000 €. In exceptionally grave cases, the minimum and maximum sums can be doubled.

**409. The third non-life insurance directive (Directive 92/49/EEC)** Directive 92/49/EEC on direct insurance indicates at article 7 the information that must be contained in the programme of activities that companies involved in insurance policies disciplined by the above directive must present. Art. 8 states the appropriate remedies for failure to give the correct and necessary information to partners and shareholders. Directive 92/49/EEC

was implemented in Italy by Legislative Decree 17/3/1995 n. 175 "Implementation of Directive 92/49/EEC on direct insurance other than life insurance". Art. 14 of the Legislative Decree specifies the elements that must be contained in the programme of activities that insurance companies must present in order to obtain the authorisation to operate from the regulatory authority, ISVAP. Art. 17 establishes that the authority must deny authorisation in cases where the programme does not contain the specified information.

**410. The data protection directive (Directive 95/46/EC)** Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data, expressly states in Arts. 10 and 11 the information that must be given to any interested party. The member states must make sure that the person responsible for the treatment of the customer, or his representative, must inform the customer of the identity of the person responsible, or his representative if the customer is unaware of it. He must also inform the customer of the particulars of the service and any ulterior information that may be necessary for fair treatment of the individual. Where the data is not collected for the benefit of the customer, member states must ensure that the person responsible, or his representative, discloses the information at the time of the data registration or when the data is to be referred to a third party or, at the latest, at the time of the first communication between the parties. This action does not apply where the information of the interested party is impossible to find, or is a disproportionate request, or in cases where the registration or communication is requested by law, particularly on the subject of statistical data, historical or scientific research. However, in such cases the member states must provide appropriate safeguards. The Directive does not include remedies for breach of these duties to inform as described above. This aspect is left for each individual member state. The Directive was enacted in Italy by Law 31/12/1996 no. 675. Art. 39 of this law set the penalty for such a breach between a minimum of one million Lire and a maximum of six million Lire (€ 3,098). In 2003 it was replaced by a new statute protecting the personal data of consumers.

**411. The commercial agents directive (Directive 86/653/EEC)** Directive 86/653/EEC on the coordination of the laws of the member States relating to self-employed commercial agents provides at art. 3 that the commercial agent must, in exercising his role as agent, protect the interests of the principal and must act in good faith and loyally in communicating all the necessary information at his disposal. In the same way the principal must also act in good faith and loyally in his relationship with the agent, as described in art. 4 of the Directive, providing him with all necessary information for performance of the contract. Particularly in cases where the number of commercial transactions is far lower than that expected by the agent, the principal must make this known to him as soon as possible. The Directive does not include any remedies for the breach of these duties, leaving this aspect to the national legislation of each individual member state. The Directive was implemented in Italy by Legislative Decree 15/2/1999 no. 65 named "Adoption of the regulation regarding independent commercial agents, in further implementation of Directive 86/653/EEC of the Council, dated 18<sup>th</sup> December 1986". The Decree has replaced article 1746 of the Italian Civil Code: "In the execution of the assignment the agent must protect the principal's interests and act with

transparency and in good faith. In particular, he must fulfil the assignment conforming with his instructions and furnish the principal with information regarding the market conditions within the area of his assignment, and any other information deemed useful in assessing the worth of individual transactions. Any pact contrary to this is null and void.” Also, art. 1749 of the Italian Civil Code is substituted by the new article 1749 entitled “obligations of the principal” that directly quotes the content of art. 4 of the Community Directive 86/653/EC.

**412. The public works contracts directive (Directive 93/37/EEC)** Directive 93/37/EEC on the allocation of building contracts for public works lays down in art. 8 that the awarding administration must inform every interested party which has been rejected or has requested clarification of the rejection, the reasons and the name of the responsible person, within fifteen days of receiving the offer. In cases where the administration decides to renounce the adjudication of a contract or to restart the procedure, it must inform the candidates and the Office of Official Publications of the European Community of the reasons for the decision. Once the contract is completed, the adjudicating administrations must compile a report containing the information required as listed in the directive. The directive also dedicates an entire chapter to the collective laws on advertising. No sanctions for breach of the duties are included in the directive, leaving the individual member states to legislate at their own discretion.

**413. The consumer sales directive (Directive 99/44/EC)** Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees lays down in art. 2 that the seller must deliver goods that conform with the description in the contract to the buyer. Directive 99/44/EC also establishes at art. 6 that the guarantee in contracts for the sale of consumer goods must: indicate that the buyer is protected by applicable national legislation on the sale of consumer goods; specify that the guarantee does not in any way obstruct the rights he has under it; indicate in a clear and comprehensible manner the object of the guarantee; indicate the essential elements of the guarantee, notably its duration and territorial limitations; state the name and address of the party giving the guarantee. The consumer may request that the guarantee be put in writing or otherwise recorded, and that he may have access to it. The member state in which the consumer good is sold can impose in its own territory that the guarantee is produced in one or more of the official languages of the EU. The Directive establishes however that a guarantee that does not conform to the given requirements remains valid and the buyer may have recourse to demand its application. Art. 9 states that the member states must adopt appropriate measures to inform the consumer of the measures of internal law applying the Directive and encourage professional organisations to inform the buyer of his rights. The Directive was implemented in Italy by Legislative Decree 2/2/2002 no. 24 entitled “implementation of Directive 1999/44/EC on certain aspects of the sale and of consumer guarantees”. The Legislative Decree inserted the instruction on the sale of consumer goods in the Italian Civil Code by the addition of a paragraph 1 *bis* in the section regarding the sale of movable objects. In particular, art. 1519 *ter* c. c. directly quotes the content of art. 2 of the Directive. Art. 1519 *septies* directly quotes art. 6 of the Directive on the subject of guarantees. The most significant variation of the original text is in the choice of language in expressing the guarantee. The section in the Civil Code establishes

that the guarantee must be written in Italian using characters of the same or similar format as would be used in other languages.

#### (cc) Liability for prospectuses

414. **Regulators' liability** In Italy the Constitution gives a first principle of protection for depositors. Art. 47 (1) of the Italian Constitution establishes that: "*The Republic encourages and safeguards savings in all forms. It regulates, co-ordinates and oversees the operation of credit*". The rationale lying behind the constitutional provision was to impose a duty on the state to supervise banks in the interest of depositors. Until recently the courts preserved a sort of judicial immunity from actions in damages against the Italian financial regulators.<sup>1414</sup> The situation has changed following the HVST case, decided in March 2001,<sup>1415</sup> in which the *Corte di Cassazione* found *Consob*, the Italian regulatory

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<sup>1414</sup> The issue of the public authorities' liability for negligent supervision arose for the first time on 1958, in the *Banco De Calvi* case (Court of Appeal of Genoa, 15 January 1958). In the sixties and seventies there were two cases decided by the Tribunal of Rome, the *Banca Bertolli* (Tribunal of Rome 30 April 1963) and the *Banca Privata Italiana* (Tribunal of Rome 27 April 1977) judgments. In the eighties and nineties we can find some other cases dealing with the issue, namely: the *Banco Ambrosiano* (*Corte di Cassazione* 29 March 1989, n. 1531), the *Cassa di Risparmio di Prato* (Tribunal of Prato 13 January 1990; Court of Appeal of Florence 20 May 1991; *Corte di Cassazione* 27 October 1994, n. 8836), the "HVST", the "Sgarlata", the salvage plan for the *Perfin-Montedison* (Tribunal of Milan 23 June 1997) group and, finally, the "Zoppi SIM". In all the mentioned cases, except the *Sgarlata* and the *Cassa di risparmio di Prato* ones, the investors' claims were stroke out. The argument adopted by Courts was that: i) investors can sue the public administration in damages only if they suffered a damage to an individual right, being not sufficient a damage to a legitimate interest; ii) the question of establishing if plaintiffs have a cause of action in damages is related to the definition of their subjective position, that is not a question of jurisdiction but of merit, which has to be decided in front of the ordinary judge; iii) the supervision activity provided by the public bodies is given only in the public interest and it involves administrative discretionary powers; consequently investors had only a subjective position of legitimate interest and not an individual right. The solution provided by the *Corte di Cassazione* in both the *Sgarlata* and the *Cassa di risparmio di Prato* cases was different. In deciding the *Sgarlata* case the *Corte di Cassazione* held that a public authority, even in the field of discretionary powers, has to act in respect of both Art. 97 of the Italian Constitution, which establishes the principle of legality, impartiality and good administration, and of the *neminem ledere* rule. In the case of a public administration causing a damage to an individual right in breach of one of these principles, it can be sued in tort under article 2043 civil code, the general tort clause. In the *Cassa di risparmio di Prato* case the *Corte di Cassazione* held that, in case of an investor suffering a damage as a consequence of the negligent supervision's activity of a public body, his subjective position has to be qualified as an individual right, namely the *diritto all'integrità del patrimonio* established for the first time in the *De Chirico* case (Cass. 24 May 1982, n. 2765 (Failla v. Paskwer – De Chirico)).

<sup>1415</sup> Cass. 3 March 2001 n. 3132. The case decided by the Italian *Corte di Cassazione* arises from a public offering of atypical securities. A group of subscribers decided to sue, on one hand, the chiefs executive of the promoting company (Tribunal of Milan 17 July 1997, published in Rep.

commission for the securities market, liable for the damages suffered by the investors.<sup>1416</sup> After the HVST case depositors who want to sue the Italian regulator will have to prove the usual conditions of tort liability set out in Art. 2043 Civil Code, which establishes: “a deliberate or negligent act of any sort, which causes an unjust harm to another, obligates the person who committed it to compensate for the harm”.<sup>1417</sup> It follows that Italian

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Foro It. (Società), n. 666) according to Art. 2395 of the Civil Code and, on the other hand, the Consob’s relevant officers before the Milan Tribunal to recover all or part of the money they lost as a consequence of the incorrect information contained in the prospectus. According to the plaintiffs’ claim: the authorisation granted by the Consob in relation of the public offer of atypical securities was unjust and consequently they had been wrongly induced to subscribe the proposal; the identification of the irregularities did not require any particular investigation being sufficient a diligent analysis of the documents held by the Commission; the Commission failed to realise that the real value of the assets of the company was not of IT Lire 44 billion as stated in prospectus but of IT Lire 20 million, and thus because the fee simple on the tourist village real estate had not been acquired. In any case, even after the acquisition of the title on the real estate (January 1984) the assets of the company did not exceed the value of IT Lire 22 billion; Consob had a duty to advise the investors of the real value of the assets when the first news on the irregularities committed in the financial activities by the promoting company appeared.

<sup>1416</sup> In order to understand properly the HVST case it must be noticed that the issue of the Consob’s liability had to be decided according to the relevant law at the moment of the public offer (Law 7 June 1974 No. 216 as amended by Law 23 March 1983 No. 77). The old legislative framework has been recently replaced by a restatement of securities law, commonly known as T.U.F. (D.lgs 24 February 1998 n. 58 *Testo unico delle disposizioni in materia di intermediazione finanziaria*), which is a fully comprehensive restatement of the relevant dispositions in the field of financial activities harmonising the system. The Commission is nowadays provided with even more powers in relation to public offering. The solution adopted by the *Corte di Cassazione* is therefore applicable even after the introduction of the T.U.F.

<sup>1417</sup> See T.G. *Watkin*, *The Italian Legal Tradition*, 1997, Ashgate, p. 247. Until recently Courts created a judicial rule according to which for a damage to be unjust it should be inferred to a proper right being not sufficient a prejudice to legitimate interest (The subjective right is commonly defined as “the power to act for the satisfaction of an interest which is recognised and protect by the legal system” it is “the power to act within the limits indicated by the relevant norm or, in other words, the legal possibility of taking a stance in relation to a given legal situation”. The legitimate interest can be defined as “the pretence that the administration validity exercises its power to sacrifice or expand a right” or, in other words, “the pretence that the administration exercises its power in accordance with the norms which regulate the exercise of its power” (G. *Leroy Certoma*, *The Italian Legal System* [1985] 20-23). The previous stance of the jurisprudence, which considered the injury unjustified only in case of prejudice to someone’s right, was criticised by Cass. 3 May 1996, n. 4083. Of different drift was nonetheless the decision of the Constitutional Court 8 May 1998, n. 165 that declared inadmissible the question of whether or not article 2043 of the Civil Code, as interpreted in case law, was in contrast with the Italian Constitution. This situation was nevertheless seen as unacceptable particularly since it conflicts with Community Law provisions and the European Court of Justice case law (especially with the *Francoovich* Judgement of 19 November 1991, Cases C-6/90

courts will ask depositors to prove either the bad faith or the negligence of the public officer. The criterion followed by the *Corte di Cassazione* in the HVST case is that, in order for liability of the members of the commission to arise, there should be an omission to act amounting to gross misconduct in the eyes of the *Corte di Cassazione*, because the false information contained in the prospectus should appear clear *ex actis* (i. e. it could and should have been detected using normal diligence on the face of the documents).<sup>1418</sup> The *Corte di Cassazione* held that, once ascertained that the information contained in the prospectus was untrue, the commission had a duty to act in order to stop the public offering. At the moment of the public offer, the commission's activity was ruled by the

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and 9/90, *Franovich v. Italy* [1991] ECR I-5357 decision in which the ECJ establishes the principle of State liability in cases of non implementation of a directive) A first step in the direction of encompassing the prejudice to someone's legitimate interest in the scope of the article 2043 of the Civil Code was taken in the implementation of Community Law. In short, since Community Law (EC Directive 665/89) does not discriminate between rights and legitimate interests, its implementation in the national rules introduced (Art. 13 of the Law n. 142/1992, article 32, paragraph 3, of the Law n. 109/1994, Legislative Decree 157/1995) the possibility to claim for damages also in the case of prejudice of a legitimate interest in specific fields, such as contracts for public procurements. Failure to implement EC Directives has been, in its turn, considered by the European Court of Justice as a case of liability in tort of Members States and under this respect there is no point in distinguishing between rights and legitimate interests (European Court of Justice 8 October 1996, 5 March 1996, 22 April 1997). At judicial level, the final result was achieved only in 1999 with the *Vitali* decision. In the *Vitali* judgement, the *Corte di Cassazione* reinterpreting Art. 2043 of the Civil Code, held liability in tort may arise whenever there is a damage to an "individual interest significant for the legal system", without any distinction between proper right and legitimate interests. In other words, in the *Vitali* case the *Corte di Cassazione* considered also the prejudice to a legitimate interest as an unjustified injury. Recently, Art. 33 of the D.lgs 31 March 1998 No. 80 provided administrative courts with an exclusive jurisdiction over all cases involving public services, including the ones related "to credit, insurance supervision and financial market". Art. 35 gave the administrative courts the power to recognise damages. In its judgement of 17 July 2000 No. 292, the Italian *Corte Costituzionale* declared the illegitimacy of article 33 where it confers to administrative judges an exclusive jurisdiction in the field of public services, being that provision contrary to the delegation law which was merely intended to provide the Government with the power to increase the instruments available to administrative courts. Art. 33 has been finally replaced by Art. 7 of the Law 21 July 2000 No. 205, which establishes an exclusive jurisdiction of administrative courts in all cases involving public services, including the ones relating to the "supervision over credit, insurance and financial market".

<sup>1418</sup> The general rule in assessing the issue of the public authorities' negligence is that this cannot be inferred from the illegality of the administrative act. More in detail two different tests have been adopted by courts. The *Corte di Cassazione*, in its recent judgement No. 500/2000, held that negligence can be inferred from the violation of the rules of impartiality, fairness and good administration. On the other hand, the *Consiglio di Stato*, in its judgement No. 3169/2001 criticised this criterion for being non exhaustive, and proposed the different test of the seriousness of the violation which occurs when a general rule on the administrative proceeding is breached.

Law of 7 June 1974 No. 216, as amended by the Law of 23 March 1983 No. 77, which imposed additional disclosure requirements for any promoter who wanted to launch a public offer of financial investments. According to Articles 18 and 18 *bis, ter* and *quater* of Law June 7<sup>th</sup>, 1974 No. 216, promoters are responsible for the completeness and fairness of the information furnished to the commission through the prospectus registration. The *Corte di Cassazione* held that the Law of 7 June 1974 No. 216 (especially article 18 *quater*) already provided the commission with the enforcement powers throughout the registration process.<sup>1419</sup> Furthermore, the prospectus contained a warning by which the commission informed the investors that: it did not review the merit of the investment; that the publishing of the prospectus did not imply any guarantee that the information furnished through the prospectus was truthful and complete; and that the issuer was the only person responsible for the information contained in the prospectus. The *Corte di Cassazione* held that the two clauses were *contra legem* and that they could only be considered as a warning that the registration of the prospectus did not imply an evaluation of the commission on the offering. As affirmed by the *Corte di Cassazione*, the causal link has to be established through a forecast of what should have been the effect of a timely and correct exercise of the commission's powers on the subscribers' investment, looking especially at the possible combination of charges of other persons in accordance with Art. 41 of the Criminal Code,<sup>1420</sup> which is applicable to tort law. The *Corte di Cassazione* held, on the one hand, that the press news, far from being sufficient to warn the public of the real state of the promoting company and of their investment, imposed on the commission a duty to prevent the causation of damages to the investors. On the other hand, the publishing of the news of the irregularities committed by the promoting company should have been taken into consideration in determining potential contributory negligence between the commission and the investors, pursuant to Art. 2056 and 1227 of the Civil Code. Art. 2056 of the Civil Code (measure of damages) establishes: "(1) The damages due to the person injured shall be determined in accordance with the provisions of Articles 1223, 1226 and 1227". According to Art. 1227 of the Civil Code (contributory negligence of the creditor): (1) "If the creditor's negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it. (2) Compensation is not due for damages

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<sup>1419</sup> The Commission is nowadays provided with even more powers in relation to public offering. The solution adopted by the *Corte di Cassazione* is therefore applicable even after the introduction of the T.U.F. which have replaced Art. 18 of the Law 7 June 1974 No. 216 with Articles 94 and et seq.

<sup>1420</sup> Art. 41 Criminal Code (Concurrent Causes), translation by E.M. Wise, The Italian penal code (1978): "(1) The presence of pre-existing, simultaneous or supervening causes, even though independent of the act or omission of the offender, shall not exclude a casual relationship between his act or omission and the event. (2) Supervening causes shall exclude a casual relationship when they were in themselves sufficient to bring about the event. If, in that case, the act or omission previously committed itself constitutes an offence, the punishment prescribed therefor shall be applied. The previous provisions shall apply even when the pre-existing, simultaneous or supervening cause consists of the unlawful act of another person".

that the creditor could have avoided by using ordinary diligence".<sup>1421</sup> This means that those investors who had subscribed the prospectus after the press news on the irregularities committed by the promoting company, may receive lower compensation (or no compensation at all) for the damages they suffered. The *Corte di Cassazione* held that the *Consob* commissioners can be sued in tort if (i) they fail to use all the statutory powers conferred on them by the law in order to avoid the publication of the false information contained in a prospectus and (ii) if the false information appears from the documents provided by the promoting company. More particularly *Consob's* liability was based on the existence of: i) a negligent action of the commission: the false and misleading nature of the information regarding the investment plan would have appeared if the commission had performed a diligent and thorough review of the documents provided by the promoters; ii) a causal link between the action or omission and the fact which caused the damage: if the commission had used its power there would have been no misleading information and consequently no recoverable damage; iii) a breach of a statutory duty to supervise; iv) a damage to a proprietary right.

**415. Takeovers** Takeovers are mainly governed by Articles 102-112 of the *Testo Unico Finanziario* (T.U.F.), which provide the legislative framework. These are then complemented by a regulation issued by *Consob* to provide more detailed provisions.<sup>1422</sup> An offer to the public to buy or exchange financial securities covers a wide range of products. According to Art. 102 of T.U.F. (obligation of offerors and powers of prohibition), persons who make a public offer to buy or exchange financial securities shall give advance notice thereof to *Consob*, attaching a document to be published containing the information that is necessary for investors to make an informed assessment of the offer. The first two requirements to be satisfied in order to make a public offer to buy or exchange financial securities, are (i) to provide a notice to the commission before the offer has been made with documents attached, which (ii) has to be published containing all the information necessary for an investor to make an informed assessment. The first requirement is ruled by Art. 37 of Regulation 11971/1999 – Notification of offers – which specifies that the notice to be submitted to the commission according to Art. 102 shall be accompanied by a copy of the offer document and the acceptance form, drawn up in accordance with the model forms in Annexes 2A and 2B respectively.<sup>1423</sup> Finally, the

<sup>1421</sup> Translation by M. Beltramo, G.E. Longo, J.H. Merryman, *The Italian Civil Code and complementary legislation* (2001).

<sup>1422</sup> In fulfilment of this duty, the Commission enacted Regulation n. 11971 of 14 May 1999 (*Consob* Regulation 11971/1999 implementing the provisions on issuers of Legislative Decree 58 of 24 February 1998 as amended by *Consob* Resolutions No. 12745 of 6 April 2000, No. 13086 of 18 April 2001, No. 13106 of 3 May 2001, No. 13130 of 22 May 2001, No. 13605 of 5 June 2002 and No. 13616 of 12 June 2002) which provides specific provisions (Articles from 35 to 50) dealing with takeovers.

<sup>1423</sup> Lack of space does not consent a full analysis of the content of the two Annexes. They may nevertheless be found in the *Consob* website at: [www.consob.it](http://www.consob.it). More in detail such notifications shall state that: a) applications have been submitted at the same time to the competent authorities for the authorizations needed to acquire the holdings in question; b) the decision has been taken to call the necessary shareholders' meeting where financial securities

press release shall be sent to Consob at least two days before the date set for its publication. Supplemented with any information requested by Consob, it shall be publicised on the market not later than the first day of the acceptance period. T.U.F. provides the Commission with relevant powers in order to ensure transparency. In this respect Art. 103, after establishing that offers shall be irrevocable and that any clause stating the contrary shall be null and void, clarifies that the offer shall be made upon the same conditions to all the holders of the relevant financial products. Furthermore, issuers are subjected: i) from the date of publication of the offer document until the close of the offer, to Articles 114 (3) and 114 (4); ii) from the date of the notification provided for in Art. 102 (1) until one year from the close of the offer, to Article 115.<sup>1424</sup> Art. 103 (4) (b) establishes that the Commission shall set out rules concerning the correctness and transparency of transactions involving the financial products that are the object of the

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are to be offered in exchange and they have to be issued. 2. The notification of an offer shall be disclosed without delay to the market in a press release and at the same time to the issuer. Press releases shall specify the essential elements and aims of the offer, the guarantees foreseen and the manner in which any financing is to be arranged, any conditions to which the offer is subject, holdings already owned or acquirable by the offeror or persons acting in concert therewith, and the names of any advisors. Where the offeree company is a listed company, Art. 66.3 shall apply. Art. 38 deals with the offer document and establishes that: "(1) The offer document, supplemented in accordance with any requests by Consob pursuant to Art. 102.2 of the Consolidated Law, shall be sent to the issuer without delay. (2) The document shall be disseminated by means of integral publication in newspapers with adequate circulation or by means of delivery to intermediaries and simultaneous publication in newspapers with adequate circulation of the notice of delivery, or by other means agreed with Consob, according to procedures that must ensure that the essential elements of the offer and of the document are accessible to all interested parties. A copy of the document shall be sent to Consob in electronic form. 3. Depositories shall inform depositors of the offer's existence in time for acceptance. 4. A copy of the offer document shall be delivered by the offeror and by the appointed intermediaries to anyone who applies. Depositors may obtain the document from their depositories". The content of the issuer's press release is contained in Art. 39. Such document shall: a) contain all the information serving to evaluate the offer together with the directors' reasoned opinion thereon, with an indication, where applicable, of its approval by majority vote, the number of those dissenting and, where they so request, their names; b) make known any decision to convene shareholders' meetings pursuant to Art. 104 of the Consolidated Law for authorization to carry out acts or operations that may hinder the achievement of the objectives of the offer; where the decision is adopted subsequently, it shall promptly be made known to the market; c) update the information available to the public on direct or indirect possession of the company's shares by the issuer or the directors, including those of subsidiary and controlling companies, and on shareholders' agreements referred to in Art. 122 of the Consolidated Law involving shares of the issuer; d) provide information on significant matters not covered in the latest annual report or the latest interim report.

<sup>1424</sup> A different regime is provided for offerors, persons who control or are controlled by offerors or issuers and intermediaries appointed to collect acceptances. see Art. 103 (5) and Articles 41 (5) and (6).

offer. Transparency rules are set out in Art. 41 (1) to (4). An important provision is the Article which sets out “proper conduct rules”.

**416. Consumer credit**<sup>1425</sup> The notion of consumer credit is provided by Art. 121 of the T.U.B.<sup>1426</sup> In contrast with the European Directive, the notion of consumer credit

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<sup>1425</sup> In Italy the implementation of Directive 87/102/EEC, as amended by Directive 90/88/EEC, was obtained through articles 18 to 24 of the Law February 19<sup>th</sup>, 1992 No. 142. Law 142/92 has been replaced by articles 121 to 126 of the D.lgs September 1<sup>st</sup>, 1993 No. 385 – T.U.B. Testo Unico Bancario – also known as the 1993 Banking Law. Directive 98/7/EEC has been implemented in Italy through the Ministerial Decree of May 6<sup>th</sup>, 2000 No. 502432. Published in Gazzetta Ufficiale of May 29<sup>th</sup>, 2000, No. 123 and in Bollettino di Vigilanza of the Banca d'Italia No. 5 of May 2000, available at [www.bancaditalia.it](http://www.bancaditalia.it). In so far as Consumer Credit is concerned, the T.U.B. provides general rules which have to be implemented by mean of secondary legislation enacted by the CICR – *Comitato interministeriale per il credito e il consumo* (referred also as the Credit Committee), the Banca d'Italia and, finally, the Ministry of Treasury. According to article 161 (2) of the T.U.F., even though the provisions of law 142/92 regulating consumer credit have been repealed by the T.U.B., they shall continue to be applied until the entry into force of the regulations issued by the credit authorities pursuant to the Legislative Decree. Finally, consumer credit is also regulated by Chapter I – Banking and financial transactions and services – of the Title VI – Disclosure of Terms and Conditions of Contracts – of the T.U.B. Art. 115 – Scope – in fact establishes that: (1) The provisions of this Chapter shall apply to activities carried on in Italy by banks and financial intermediaries. (2) The Minister of the Treasury may specify other persons who shall be subject to the provisions of this Chapter in consideration of the activities they carry on. (3) The provisions of this Chapter shall apply to transactions referred to in Chapter II of this Title for matters not otherwise regulated.

<sup>1426</sup> It reads: (1) Consumer credit shall mean the granting of credit in the course of a trade, business or profession in the form of deferred payment, a loan or other similar financial accommodation to a natural person acting for purposes outside his business, trade or profession (a consumer). (2) The granting of consumer credit shall be restricted to: a) banks; b) financial intermediaries; c) persons authorized to sell goods or services in Italy, exclusively in the form of deferred payment of the price. (3) The provisions of this Chapter and of Chapter III insofar as they are compatible shall apply to third parties intervening in consumer credit business. Art. 121 (4) contains, furthermore, a list of the excluded activities. According to it the relevant provisions shall not apply: to loans larger or smaller than the respective limits established by the Credit Committee by a resolution which shall take effect on the thirtieth day following its publication in the *Gazzetta Ufficiale della Repubblica Italiana*; to supply contracts under Art. 1559 ff. of the Civil Code, provided they are completed in writing in advance and a copy given to the consumer at the time of completion; to loans repayable in a single payment within eighteen months for which the only charges, if any, are not computed as interest, provided the amount of such charges is contractually determined; to loans made without any direct or indirect consideration in the form of interest or other charges, with the exception of the reimbursement of documented out-of-pocket expenses actually incurred; to loans intended for the purpose of acquiring or retaining a property right in land or in an existing or projected building, or for the purpose of renovation or improvement; to hiring agreements, provided they include the

provided by article 121 of the T.U.B. does not cover pre-contractual relationships.<sup>1427</sup> The CICR (the Credit Committee) – has recently proposed a regulation<sup>1428</sup> dealing with

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express clause that the title to the hired good may at no time be transferred, with or without consideration, to the hirer. Art. 122 (1), dealing with the annual percentage of rate (APR), establishes that it shall be the total cost of the credit charged to the consumer, expressed as an annual percentage of the amount of credit granted. The APR shall include interest and all the costs to be sustained for the use of the credit. Art. 122 (2) then establish that the CICR shall establish the method of computing the APR, specifying the items to be computed and the computation formula. Finally, article 122 (3) clarifies that where loans may be obtained only through the intervention of a third party, the cost of such intervention must be included in the APR.

<sup>1427</sup> This cannot be seen, nevertheless, as a failure to implement the directive because both, the Civil Code (eg. principles of fairness and good faith), article 123 of the T.U.B., as well as the provisions dealing with advertisings provide a certain degree of protection for consumers in pre-contractual relationships. Art. 123 (Public notice), in extending the application of article 116 to consumer credit transaction, clarifies that the public notice shall include a statement of the APR and the period of its validity. Also, advertisements and offers effected by any means whereby a person indicates the interest rate or other figures concerning the cost of credit shall state the APR and the period of its validity. Finally, article 123 (2) confers the Credit Committee the power to specify the cases in which the APR may be stated by way of a representative example where there are justified technical reasons. A further degree of protection is provided by articles 124 and 125. Art. 124, in dealing with contracts, extends the application of article 117, paragraphs 1 and 3, to consumer credit agreements, and prescribes their content. Art. 125 provides other means to guarantee a further degree of protection for consumers. More in detail it establishes: (1) The provisions of Art. 1525 of the Civil Code shall also apply to all consumer credit agreements in connection with which a charge is imposed on the goods purchased with the proceeds of the loan. (2) The right to anticipate performance or terminate the contract without penalty shall pertain only to the consumer, with no possibility of agreement to the contrary. Where the consumer exercises the right to anticipate performance he shall be entitled to an equitable reduction in the total cost of the credit, determined in the manner established by the Credit Committee. (3) Where a creditor's rights under a consumer credit agreement are assigned, the consumer shall still be entitled to plead any defence against the assignee that was available to him against the assignor, including set off, also by way of derogation from the provisions of Art. 1248 of the Civil Code. (4) Where there is non-performance by a supplier of goods or services, a consumer who has given notice of the delay without satisfaction shall have a right of action against the lender within the limits of the credit granted, provided there is an agreement whereby the lender has the exclusive right to grant credit to customers of the supplier. (5) The responsibility referred to in paragraph 4 shall also extend to third parties to whom the lender has assigned the rights attaching to the credit agreement. Art. 126 (Special rules for overdraft facilities): (1) Contracts with which banks and financial intermediaries grant consumers an overdraft facility not associated with the use of a credit card shall contain, on pain of nullity, the following indications: *a*) the credit limit and the expiry date; *b*) the annual interest rate and an itemized description of the applicable charges from the date the contract is completed, as well as the conditions that may determine the alteration of such terms during the life of the contract. Apart from such charges

transparency in contractual conditions of banking and financial transactions and services.<sup>1429</sup> It is composed of four sections and fourteen articles. Section I of the Regulation, consists of two articles which contain general provisions. Art. 1 provides a list of definitions. According to Art. 2 – *general standards* – all information prescribed in the regulation should be disclosed to customers in an appropriate manner to the means of com-

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nothing shall be payable by the consumer; c) the manner of terminating the contract. Art. 127 of the T.U.B. establishes that derogations from the provisions of this Title may be made solely to the advantage of the customer. Paragraph 2 then adds that the nullity provisions of this Title may be enforced only by the customer. According to paragraph 3 the resolutions within the scope of the authority of the Credit Committee that are provided for in this Title shall be adopted by the Committee, acting on a proposal from the Bank of Italy; the proposal shall be formulated after consulting the UIC for persons operating in the financial sector entered only in the general register established by Art. 106. Art. 128 finally deals with controls.

<sup>1428</sup> Not yet in force.

<sup>1429</sup> The regulation has to be related with the provisions of the T.U.B., which confer the CICR the power to enact pieces of secondary legislation to implement the statutory provisions of the T.U.B. The regulations have been enacted according to the legislative framework provided by the T.U.B., in particular having regard to: i) Art. 116 (3): According to article 116 (1) of the T.U.B. on all premises open to the public, notices shall be provided showing interest rates, prices, charges for customer notifications and every other economic condition concerning the transactions and services offered, including interest on arrears and the value dates for the recognition of interest. Such notices may not make reference to usage. In addition, Art. 116 (3) confers the CICR the power to: a) specify the transactions and services which shall be subject to disclosure requirements; b) issue regulations concerning the form and content of the public notice, the manner in which it is to be provided and the conservation of the documents corroborating the information made public; c) establish uniform methods for the disclosure of interest rates and the computation of interest and other items affecting the economic aspects of contractual relationships; d) specify the essential elements among those referred to in paragraph 1 that must be disclosed in advertisements and offers, in whatever form they may be effected, with which the persons referred to in Art. 115 announce the availability of transactions and services (According to Art. 116 (4) of the T.U.F. such provision of information to the public shall not constitute a public offer under Art. 1336 of the Civil Code); ii) Art. 117 (2): Art. 117 (1) establishes that banking contracts shall be reduced to writing and customers shall be given a copy. Art. 117 (2) then confers the CICR the power to provide that certain types of contract may be completed in a different form where there are justified technical reasons. In both the cases a failure to comply with the prescribed form renders the contract null and void; iii) Art. 118 (1): which establishes that, were continuing contracts contain agreements providing for the unilateral alteration of rates, prices or other terms or conditions, and it is unfavourable for the customer, it should be notified to him or her in the manner and the time limits established by the CICR; iv) Art. 119 (1): which establishes that, where a contract is continuing persons referred in article 115 shall provide the customer with a clear and complete written report on the relationship at the expiry of the contract at least once a year. The same article than provides the CICR with the power to establish the form and content of such report; v) Finally Art. 127 (3) clarifies that all the mentioned resolutions within the scope of the authority of the CICR shall be adopted by the Committee acting on a

munication adopted, in a clear and exhaustive way, having regard also to special features of the relationship involved and of the addressee of such communications. According to Art. 3 all the provisions contained in articles 4 to 9 apply to transactions and services listed in the annex.<sup>1430</sup> Several articles of the regulations deal with the information to be provided to customers: i) Art. 4 – *Notice to the public* – establishes that, in conformity with the provisions enacted by the *Banca d'Italia*, intermediaries must display in all premises open to the public and make available to customers, a notice called “*main provisions on transparency*”, containing a list of all the rights and instruments of protection contained in Title VI – Disclosure of Terms and Conditions of Contracts – of the T.U.B.; ii) Art. 5 – *Information documents* – obliges intermediaries to make available to customers “information documents” containing information related to the intermediary, interest rates, expenses, charges and other contractual conditions as well as the more common risks involved in the transaction or service. These information documents must be dated and updated on time, and the intermediary must keep a copy of them for five years. Finally, the *Banca d'Italia* has the power both to prescribe that the kind of information required may be related to the technicality and complexity of the transactions or operations and to identify which transactions or services require the delivery of a copy of the document to the customer prior to the conclusion of the agreement; iii) Art. 6 – *offering outside business premises* – requires the offeror to deliver a copy of both the notice to the public (of article 4) and the information document (of article 5) to the customer prior to the conclusion of the agreement. The same requirement applies for distance offering; iv) Art. 7 – *advertising* – establishes that any advertising for transactions or services should both specify the nature of the advertisement and indicate the availability to customers of information documents; vi) Articles 8 and 9 deal with information to be provided respectively in pre-contractual and contractual relationships. Before the conclusion of the agreement the customer has a right to obtain a comprehensive copy of the agreement in order to be able to consider its content appropriately. The delivery of the copy does not bind the parties to conclude a contract. When a contract has been signed, a document containing a summary of all main contractual clauses should be given to the customer. The *Banca d'Italia* will set out the criteria according to which the document should be drafted. *Banca d'Italia* has furthermore the duty to single out the transactions and services which, by reasons of their technical characteristics, oblige the intermediaries to provide customers with an ISC – *Indicatore Sintetico di Costo* – i. e. a combined indicator of the price comprehensive of interest rates and of the charges which determine the total cost

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proposal from the Bank of Italy, which has to be formulated only after consulting the UIC – *Ufficio Italiano dei Cambi*.

<sup>1430</sup> These are: deposits, bonds, deposit certificates, other debt certificates, loans, credit opening, banking advances, endorsement credit, portfolio discount, financial leasing, factoring, other sources of financing, received warranties, correspondence banking accounts, collections and payments, issue and management of means of payment, issue of electronic currency, paying-in and withdrawal from cash machines, purchase and selling of foreign currency, financial exchanges intermediation, custody and management of financial securities and lease of safe boxes. Even though the list contained in the annex is exhaustive, the notice confers the *Banca d'Italia* the power to ascribe to those categories other types of transactions and services whenever this is suggested by the evolution either of the activities conducted by intermediaries or of the markets.

for the consumer, in accordance with the directive which will be issued by the *Banca d'Italia*. In so far as the form of the agreements is concerned, the *Banca d'Italia* has the power to specify forms, other than written, in relation to transactions and services carried out on the basis of a written agreement as well as to transactions and services, which have to be considered as the subject of advertisement in relation to the present notice, which have a temporary nature or which involve significant expenses for the customer. In continuing or revolving contracts, alterations of interest rates, prices and other terms for transactions and services, which are unfavourable for the customer, should be communicated to him with a clear indication of the variations made. Generalised unfavourable variation may be communicated to customers impersonally, by means of publication in the *Gazzetta Ufficiale della Repubblica Italiana*.<sup>1431</sup> The *Banca d'Italia* must enact provisions governing the content and form of the communication. Finally, article 12 deals with periodical notifications. In continuing contracts intermediaries should provide periodically detailed information on the development of the contractual relationship. In every communication both the applied interest rate and the other contractual conditions should be disclosed. The *Banca d'Italia* must enact provisions ruling the content and form of the communication.<sup>1432</sup>

#### (dd) Advertising

417. **Self-regulation** In every country various concepts had developed and were proposed by businesses for the institution of regulations to govern propriety, truthfulness, and honesty in advertising. The intent was to lay down uniform models of professional behaviour for all those operating in the advertising sector, including the industries which resort to advertising to promote sales. With these ideals, initiatives for self-regulation of the advertising industry began to flourish in the 19<sup>th</sup> century.<sup>1433</sup> In Italy<sup>1434</sup> the “*Codice*

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<sup>1431</sup> Two points should be noticed. First, article 11 does not apply to variation in the interest rates independent from the decision of the parties to the agreement (Art. 11, 4). Secondly, the announcement is relevant for article 118 (3) of T.U.B.: “Within fifteen days of receipt of written notice or of other forms of notice ... the customer may terminate the contract without penalty and in its settlement obtain the application of the conditions previously applied”.

<sup>1432</sup> Banca d'Italia has to enact the relevant rules provided in the notice within 120 days from its publishing (Art. 14, 2).

<sup>1433</sup> The first “Code” in England goes back to 1890. In 1905 there was the institution of the Advertising Club of America; in 1937 the first comprehensive scheme of rules for businesses operating in the advertising sector or using advertising, edited by the *Chambre de Commerce Internationale* of Paris (entitled *Code de Pratiques Loyales en matière de publicité*).

<sup>1434</sup> The first ethical code for users of advertising was developed by Upa, (Utenti pubblicità associati) in 1951. This was followed a year later by rules from the Fip (Federazione italiana di pubblicità), which met the needs of the professional categories. In 1966 the *Codice di lealtà pubblicitaria* followed “rules for users, advertising agencies, consultants, operators of advertising media of any type and all those who have adopted the Code directly or through their associations); this was brought up to date in 1971, through the work of the Confederazione generale italiana della pubblicità (*Nuovo codice di lealtà pubblicitaria*).

*di Autodisciplina pubblicitaria*” was enacted in 1975 and has been revised on various occasions.<sup>1435</sup>

**418. Television advertising** The first Community Directive on the subject of advertising goes back to 1984, but the legislature failed to implement it for eight years.<sup>1436</sup>

**419. The Community Directive on misleading advertising** The Commission had developed a regulatory proposal on 21<sup>st</sup> March 1978; the proposal was brought forward again and was taken up with the European Parliament’s opinion and that of the Economic Social Committee in the text of the Community Directive approved by the Council on the 10<sup>th</sup> September 1984, n. 450’ CEE, on the approximation of the laws, regulations and administrative provisions of the member states concerning misleading advertising.<sup>1437</sup>

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<sup>1435</sup> Having defined the characteristics of advertising (art. 1) the code prescribes a prohibition of deceitful advertising (art. 2); at the same time it provides instructions for the use of scientific terms, technical quotations, statistical data, and the use of testimonials (arts 3 e 4). other measures related to authorship of the message and the truth of its contents (arts. 6 e 7). particular provisions exist for controlling advertising which exploits superstition, credulity and the fear of the target public (art. 8), or relating to violence, vulgarity and indecency (art. 9), giving offence to morals or religious convictions, or harmful for children and adolescents (art. 11). In order to avoid harm to consumers, it establishes (confusing the function of the advertising message with that of information and warnings on articles for sale) that “when dealing with articles likely to present dangers, particularly if they may not be recognised as such by the consumer, the advertising must clearly indicate this. In any case the advertising must not contain representations likely to induce consumers to ignore the normal rules of prudence or diminish the sense of awareness and responsibility about dangers for the health and safety of themselves and the community”. Finally, advertising must not be imitative, create confusion or exploit the trademark or reputation of another, (art. 13), denigrate, (art. 14) or compare (art. 15). There follow specific directions for credit or correspondence sales, for unsolicited supplies, special sales and liquidations and promotional sales (arts. 17-20); and directions for particular market sectors, such as alcoholic drink, cosmetics, physical and aesthetic treatment, medicinal and curative products, educational courses, financial and property transactions and organised travel (arts. 22-28).

<sup>1436</sup> Art. 8 of l. 223 of 1990 provides “radio and television advertising must not offend personal dignity, arouse racial, sexual or national discrimination, offend religious or personal convictions, nor induce conduct harmful for the health, safety and the environment. Advertising must not cause moral or physical damage to minors, nor may this be inserted in cartoon programmes. Radio and television advertising must be recognisable as such distinct from the rest of the programmes by clearly recognisable optical or acoustic means. Whilst the rules in art. 8 have a general nature, the rules are limited to advertising by radio and television.

<sup>1437</sup> The directive defines as advertising “any form of message which is distributed in the conduct of a commercial, industrial, artisan or professional business for the purpose of promoting the supply of goods and services including real property rights and obligations”. It defines deceitful advertising as that which “in any manner, including by its presentation, induces, or may induce, persons to whom it is addressed or who receive it into error and whose deceitful nature may harm the economic conduct of such persons and for this reason may damage a compe-

**420. Implementation of the Directive** By art. 41 of law 428 of 1990 (second Community Law) the scope of application of the law was established for the government to enact the Directive, implemented by legislative decree 25. 1. 1992 n. 74, the first three sections of which directly quote the content of articles 1, 2, 3 of the Directive itself.<sup>1438</sup> Arts. 4, 5 and 6 do not constitute an innovation for control of advertising, since they correspond with laws in the “*Codice di Autodisciplina*”.<sup>1439</sup>

**421. Comparative advertising** The legal treatment of comparative advertising varies in the different systems; although this is looked upon favourably within the Community, the classic Italian case law considered it potentially dangerous as liable to confuse the consumer and harm competitors. This explains its classification in terms of disloyal competition in art. 2598 of the Civil Code.

**422. The European Community policy on comparative advertising** After much hesitation, Directive n. 84/450 was amended by Directive n. 97/55/EC approved by European Parliament and Council on the 6/10/1997,<sup>1440</sup> implemented in the Italian system by

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titor”. The expression “any form of message” is very wide, however, the directive at art. 3 implies that the message contains *information*. This is because it states that, in order to establish that advertising is deceitful, one must consider all the elements. In particular, there must be examined the nature of the goods and services, the price or the manner in which it is calculated, the qualifications and rights of the advertiser. One must however consider that normally advertising does not have an informative content. The directive’s scope of operation may be enlarged if interpreted jointly arts. 1 e 2, since the definitions of art. 2 must be understood in the light of the general nature contained in art. 1: “this directive has the purpose of safeguarding the consumer and persons who carry on a commercial, industrial, artisan or professional business as well as the interests of the public in general from deceitful advertising and its unfair consequences.” As for supervision, the 1984 directive provides a variety of instruments and authorities. As instruments one can refer to the urgent measures which can be adopted with provisional or definitive effect; authorities signify the courts, administration and also the control of self-regulating bodies.

<sup>1438</sup> This confirms the circumscribed nature of the legislation, which concerns advertising which deceives the public, or creates confusion between products and damages competitors. Given the spirit of the law, it is reasonable to consider that deceitful advertising includes also that which suggests rather than informs. One may ask whether the term “public interest” can refer to such diffused interests. As an active role is recognised for associations, the reply must be positive, though without indication of the grade of representation.

<sup>1439</sup> In particular, art. 4 repeats the content of arts. 7 e 5 of the c.a.p., with the addition of subliminal advertising; art. 5 of the d.leg. is based on the content of art. 12 of the c. a. p.; art. 6 of the d.leg. has a more analytical reference in art. 11 of the self-regulation code. Art. 5 must be put together with the provisions of d.p.r. 24 May 1988, n. 224 on product liability. The producer who uses misleading advertising may be considered liable even if on its own the product does not have defects, but requires the user to follow the rules of prudence and vigilance which he did not observe because so induced by the way in which the products was handled.

<sup>1440</sup> On this, v. *Florida*, Il controllo della pubblicità comparativa in Italia, in *Il Diritto Industriale*,

legislative decree 25/2/2000, n. 67. The Directive expresses support for approval by research and certification institutes on the quality of products and services. This is to exclude the unauthorised use of distinguishing marks, stating that the use of such a mark on the part of a competitor is not to be used for marketing purposes but for the information of the general public. The Directive does not allow the member states to adopt laws that favour consumers rather than the proposal with the objective of authorising comparative advertising “with the same conditions and at a high level of protection in all member states”.

**423. Definition** The text follows the standard model of Community regulation. It states the definition of comparative advertising as being “any advertising that selects in an implicit or explicit fashion a competitor or products or services of the exact same nature offered by a competitor” (art. 2 s. 3).<sup>1441</sup>

**424. Limitations** Comparative advertising is not free of control: the Directive fixes limits within which it is possible to use such promotional techniques for products and services, taking care to protect the interests of competitors directly affected by the comparison.

**425. Remedies** To control comparative advertising which does not conform with the rules, mechanisms have been adopted from the Directive on Misleading Advertising (legal proceedings, supervision by administrative authorities, prohibition injunctions, publication of penalties and corrections).

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1998, n. 2, pp. 165 et seq.; *Rosotto*, La nuova proposta di direttiva comunitaria sulla pubblicità comparativa, *ivi*, 1994, n. 10, p. 1016; *Ghidini*, La pubblicità comparativa: prospettiva italiana dopo la direttiva 55/1997, (datt.), report presented to the Workshop on consumer rights, Madrid, 27-28 November 1998; *Musio and Naddeo*, Pubblicità e «Garanti», Salerno 1998; *Berti Arnoaldi*, Pubblicità comparativa: la scelta del legislatore italiano, in *Rivista di diritto industriale*, 2000, fasc. 3, p. 14 s.; *Colombo*, Recenti sviluppi legislativi in materia di pubblicità comparativa, in *Contratto e impresa/Europa*, 2000, fasc. p. 211 s.; *Florida*, La comparazione suggestiva, in *Il Diritto industriale*, 2000, fasc. 1, p. 64 s.; *Fontana*, La pubblicità ingannevole e comparativa, in *L'amministrazione italiana*, fasc. 6, 2000, p. 624 s.; *Paciullo*, La pubblicità comparativa nell'ordinamento italiano, in *Il diritto dell'inf. e dell'inf.*, 2000, fasc. 1, p. 113 s.; *Torino*, L'attuazione in Italia della Direttiva 97/55/EC in materia di pubblicità comparativa, in *Disciplina del commercio*, 2000, fasc. 3 p. 761 s.; *Guggino*, Primo rapporto sulla comparativa diretta, in *Il Diritto industriale*, 2001, fasc. 1, p. 102 s.; *Carbone*, La pubblicità comparativa nel quadro delle recenti metamorfosi del codice civile, in *Contratto e impresa/Europa*, Padua, 2001; *Angelini*, La pubblicità comparativa «suggestiva» alla luce della direttiva 97/55/EC, in *Contratto e impresa/Europa*, Padua, 2001.

<sup>1441</sup> Explicit manner is that which cites the name of the product, the trademark, manufacturer etc. Implicit manner is the visual audio or descriptive representation through allusive signs which recall it to the mind of the consumer.

## (b) English system

## (i) Misinformation

426. **Misinformation in the common law** In the common law, liability for misinformation may arise in two different cases: misrepresentation and non-disclosure. Misrepresentation is “a statement of fact made by one party to a contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract.<sup>1442</sup>” A representation occurs where a statement of facts, as opposite to a statement of intentions or of opinions of law, is concerned. Misrepresentation has furthermore to be distinguished, on the one hand, from mere puffs, which are considered to be statements of no legal effect, and, on the other, from promises. The latter distinction is relevant because, even though both promises and representations concern statements or actions which may create expectations in others, the common law recognises different remedies for the breach of a promise (breach of contract and promissory estoppel) and of a misrepresentation (torts of deceit and negligent misrepresentation as well as the remedies contained in the Misrepresentation Act 1967).<sup>1443</sup> Misinformation may also derive from a *non-disclosure* of relevant facts. Under English law, none of the contracting parties has a general duty to disclose

<sup>1442</sup> Cheshire, Fifoot & Furmston’s, “Law of contract”, 13<sup>th</sup> ed., Butterworths, 1996, London.

<sup>1443</sup> English law recognises three different regimes for misrepresentation in relation to the representor’s state of mind: 1) *Fraudulent Misrepresentation*: in *Derry v. Peek* (1889) 14 App Cas 337, where Lord Herschell held that a fraudulent misrepresentation occurs when “it is shown that a false representation has been made i) knowingly, or ii) without belief in its truth or iii) recklessly, careless whether it be true or false”. Liability under this head gives rise to both the common law remedy of *rescission* (i. e. the right to set aside the contract which results in the restoration of the parties to the contract to their pre-contractual positions) and to a right to damages for the tort of deceit, which will be assessed on a tortious basis; 2) *Negligent Misrepresentation*: this category has been created in *Hedley Byrne & Co. Ltd. v Heller and Partners Ltd.* [1964] A.C. 465, and is now defined as the tort of negligent misstatement. Prior to this decision a plaintiff had a choice between fraud, as it was set out above, and innocent misrepresentation, for which there is only a right to rescind. In *Hedley Byrne* the House of Lords held that the main condition to establish liability for negligent misstatements is a voluntary assumption of responsibility by the defendants towards the plaintiff, which resulted in reliance by the plaintiffs on the defendants’ statement. Where such reliance was reasonable, it is therefore possible to identify a special relationship between the parties giving rise to a duty of care. The *Hedley Byrne doctrine* had the effect to recognise damages in tort whenever the existence of a special relationship and a breach of duty was proved. In addition plaintiffs may invoke the common law remedy of rescission. The *Hedley Byrne doctrine* has been subsequently extended to pre-contractual relationships (*Esso Petroleum Co Ltd v Mardon* [1976] 2 W.L.R. 583, [1976] 2 All ER. 5). Finally, Section 2 of the *Misrepresentation Act 1967* recognised a statutory remedy in damages for negligent misrepresentation. Damages will be awarded by means of the tort reliance measure (See case *Royscot Trust Ltd. v Rogerson* [1991] 3 All ER 294); 3) *Innocent misrepresentation*: an innocent misrepresentation occurs where the representor had reasonable grounds to believe in the truth of his statement. In this case, no right to damages

relevant facts to the other. Consequently, non-disclosure in itself does not amount to misrepresentation; it becomes actionable only where it involves a breach of duty to disclose known material facts<sup>1444</sup> or where it makes a false express or implied representation. The rule according to which non disclosure cannot give rise to an action in damages, suffers some exceptions: i) where non disclosure distorts positive representations; ii) in contracts requiring *uberrima fides*; iii) in fiduciary relationships between the contracting parties.<sup>1445</sup> A duty to disclose may be, finally, imposed by means of statute.

(ii) Information in certain particular cases

(aa) Information between doctor and patient.

**427. The law of consent to medical treatment and doctor's liability for misinformation** The present paragraph is concerned with the issue of the doctor's duty to inform patients and the consequent liability in negligence which may arise whenever they fail to do so.<sup>1446</sup>

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can be recognised, but only rescission at common law as well as a possible indemnity in order to cover expenditure which the representee incurred.

<sup>1444</sup> Because the general rule is that mere silence is not misrepresentation (*Fox v MacKreth* [1788] 2 Cox Eq Cas 320), consequently the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract (*Bell v Lever Bros Ltd* [1932] A.C. 161).

<sup>1445</sup> See G.H. Treitel, *The Law of Contract*<sup>13</sup> (1999). Non-disclosure and distortion of positive representations: Silence upon some of the relevant factors may distort a positive assertion. Three are the main principles: a) even though a party is not under a duty to disclose all the known circumstances, if he makes a representation upon the matter it must be full and true and not partial or misleading (*Oakes v Turquand and Harding* [1867] LR 2 HL 325); b) where a party makes a false statement in the belief that it is true, he has the obligation to disclose the truth whenever he discovers such a mistake; c) whenever a party makes a statement which was true at the time it was made, but was subsequently found to be untrue he comes under an obligation to disclose the change of circumstances (*Davies v London and Provincial Marine Insurance Co* [1878] 8 Ch D 469). Contracts *uberrimae fidei* (e.g. contracts of insurance, purchase of shares, some kind of family arrangements, etc.): these are contracts where an information asymmetry occurs. The party which possesses a full knowledge of all material facts must fully disclose them, otherwise the contract may be rescinded. The general rule is that where there is a duty to disclose non-disclosure makes the contract voidable and not void (*Mackender v Feldia AG* [1967] 2 Q.B. 590). Fiduciary relationship between contracting parties: whenever the relation between the parties to a contract is of a confidential or fiduciary nature, the person in whom the confidence is reposed has to disclose all material facts within his knowledge (*Moody v Cox and Hatt* [1917] 2 Ch 71).

<sup>1446</sup> In a doctor-patient relationship the issue of consent arises in three fields: i) the crime of battery; ii) the tort of battery; iii) the tort of negligence. There are two main differences existing between claims involving crimes or torts in battery and the ones based on negligence. First, as was pointed out by A. Hockton (*The Law of Consent to Medical Treatment* Sweet & Maxwell, 2002, London, p. 6), in cases based on negligence patients need a wider and more detailed knowledge than the one required in cases based on battery. Secondly,

Medical law is based on the principle of self-determination.<sup>1447</sup> Therefore, for a medical treatment to be lawful, it must receive the full informed consent of a patient.<sup>1448</sup> In *Sidaway v Board of Governors of the Bethlem Royal Hospital*,<sup>1449</sup> the House of Lords applied the *Bolam* test to establish whether a doctor has acted negligently in providing information to his patients. According to the *Bolam* test “a doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art”.<sup>1450</sup> The test was subsequently specified in *Maynard v West Midlands RHA*,<sup>1451</sup> where it was held that whenever a genuine difference of opinions between two reasonable and responsible bodies of medical opinions occurs, the patient will be given the benefit of the doubt. Finally, when providing information the doctor must do his best to find out about the patient’s individual needs and priorities and the warning must be sufficiently clear and comprehensible to the patient in his or her particular circumstances and, in any case, he must take reasonable steps to ensure that his advice is fully understood by the patient.<sup>1452</sup>

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while in claims based on battery there is no need to prove that a damage was suffered by the patient, in negligence actions patients have the burden to prove, upon the balance of probabilities, that without the negligent failure to advise they would have declined treatment. It is not clear if a *duty of candour* exists in a doctor-patient relationship. For the positive see Sir John Donaldson M.R. in *Naylor v Preston Area Health Authority* [1987] 2 All ER. 353. For the negative see Stuart-Smith L.J. in *Powell v Boladz* [1998] Lloyd’s Med. Rep. 116. It must be noticed that the decision of the Court of Appeal in the case *Powell v Boladz* has been subject to a recent application to the Court of Human Rights. The decision of the European Court in *Powell v United Kingdom* (application No. 45305/99) illustrates the European Court’s general reluctance to intervene so as to create a substantive right in circumstances where none is recognised in domestic law. In other words, it can be said that the European Court will not intervene in circumstances such as this to assert the existence of a duty of care, which is not recognised, in English law.

<sup>1447</sup> See *Airedale NHS Trust v Bland* [1993] A.C. 789 at 882; *St. George’s Healthcare NHS Trust v S* [1998] 2 F.L.R.

<sup>1448</sup> For the other requirements and issues arising in the field of the informed consent, see: A. Hockton, *The Law of Consent to Medical Treatment* (2002) and *Kennedy & Grubb, Medical Law*<sup>3</sup> (2000), esp. Chap. 5, pp. 575-773.

<sup>1449</sup> [1985] A.C. 871.

<sup>1450</sup> *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 W.L.R. 582, at 587.

<sup>1451</sup> [1984] 1 W.L.R. 634.

<sup>1452</sup> See *Lybert v Warrington H.A.* [1996] 7 Med. L.R. 71. Whenever the patient is in the impossibility to give consent, either express or implied, emergency treatments are justified according to the *doctrine of necessity*. In *Re F* [1990] 2 A.C. 1, Lord Goff (at 74G) made clear that the doctrine of necessity should be confined to “actions taken to preserve the life, health or well-being of another who is unable to consent to it”. The cumulative requirements are: i) there must be a necessity to act when it is not practicable to communicate with the assisted person; ii) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interest of the assisted person. In the same case, Lord Brandon (at 55H-56B) held: “In many cases, however, it will not only be lawful for doctors on the ground of necessity, to operate on or give other medical treatment to adult patients disabled from giving their

## (bb) Information and liability of the producer or retailer: protection of the consumer

**428. Sale of goods and liability for misinformation (quality and fitness for purpose): product liability** Misrepresentation does not call for special consideration in relation to contracts for the sale of goods (section 62 (2) of the Sale of Goods Act 1979). Both the remedy of rescission for misrepresentations and the remedies provided by the Misrepresentation Act 1967 can be invoked in this field.<sup>1453</sup> Sections 13, 14 and 15 of the Sale of Goods Act 1979 lay down implied terms as to the description and quality of goods supplied under the contract of sale. Section 13 (1) reads: “Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description”. Section 13 (1A) adds that: “As regards England and Wales and Northern Ireland, the term implied by subsection (1) is a condition”.<sup>1454</sup> Sections 13 (2) and (3) then specify the content of the main rule.<sup>1455</sup> Sale agreements start from the *caveat*

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consent; it will also be their common duty to do so. It will then be the duty of the doctors...to use their best endeavours to do...that which is in the best interest of such patients”. Lord Goff (at 75) added that: “Emergency is however not the criterion or even a pre-requisite: it is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, not of emergency”.

<sup>1453</sup> According to *Curtis v Chemical Cleaning and Dyeing Co.* [1951] 1 KB 805 (CA), a seller cannot rely on any exclusion clause, no matter what liability it claims to exclude, to the extent that he or his agent has misrepresented the effect of the clause. In *Walters v Morgan* (1861) 3 De GF & J 718, it was held that “there being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralist. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement”.

<sup>1454</sup> Section 13 (1) has been interpreted (*M.F.B. Reynolds*, Benjamin’s Sale of Goods<sup>6</sup>, 2002) to cover two types of breach which on their face appear to be of different magnitude: i) failure to secure exact conformity to the full contractual description of the goods where there is one; ii) total failure to perform the contract (eg. supplying a second-hand car instead of a new one).

<sup>1455</sup> The definition of the concept of sale of goods by description has been provided in *Joseph Travers & Son Ltd. v Longel Ltd* [1948] 64 T.L.R. 150, where Sellers J. held that “sale by description may ... be divided into sales (1) of unascertained or future goods, as being of a certain kind or class, or to which otherwise a ‘description’ in the contract is applied; (2) of specific goods, bought by the buyer in reliance, at least in part, upon the description given, or to be tacitly inferred from the circumstances, and which identifies the goods”. It follows that, all contracts for the sale of unascertained goods can be considered sales by description (*Kidman v Fisker Bunning & Co* [1907] S.A.L.R. 101 at 107), most sales of future goods will likewise be sales by description. The term has been in some cases extended both to sales of specific goods which have not been seen at the time of the contract (*Varley v Whipp* [1900] 1 Q.B. 513) and to situation in which the “buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing

*emptor* principle: except where there are express contractual stipulations or, where the goods do not conform with their description or sample, the buyer buys goods as they are. Exceptions to this general rule are provided in section 14, which deals with “implied terms about quality or fitness”. Section 15 – sale by sample – finally provides both a definition of sale by sample and a list of implied conditions as regards to the quality of the goods. Whenever a lack of conformity of the goods occurs, the buyer is provided with several remedies.<sup>1456</sup> After the introduction of the Consumer Protection Act 1987 consumers may invoke a further remedy in tort.<sup>1457</sup> Section 2 of the 1987 Act – Liability

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but as a thing corresponding to a description” (*Grant v Australian Knitting Mills Ltd.* [1936] A.C. 85 at 100).

<sup>1456</sup> The remedies available to the buyer are: i) the possibility for the court to make an order of specific performance against the seller in case of contract to deliver specific or ascertained goods (Section 52); ii) the rejection of the goods: a breach of a condition by the seller confers the buyer both the right to reject the goods and a claim to damages. There are two exceptions to the general right of rejection: a) it is not recognised either for an ordinary breach of a warranty, or b) where a minor breach of one of the implied conditions as to description, quality and sample contained in sections 13, 14 and 15 occurs (Section 15 A). Even in relation to these conditions, it does not apply to a buyer who “deals as consumer”, as defined in the Unfair Contract Terms Act 1977; iii) Partial rejection of the goods: it is ruled by Section 35A. To be noticed that the buyer may lose his right to reject by waiver of that right, Section 11 (2); iv) Action for damages; v) Recovery of the purchase price: where consideration has totally failed, the buyer can recover any payments he had already paid. The damaged consumer may also invoke tort-based remedies. In particular, there might be liability for deceit (*Langridge v Levy* (1837) 2 M & W 519), for supplying irresponsible persons with dangerous articles (*Bebee v Sales* (1916) 32 TLR 413, *Yachuk v Oliver Blais Co Ltd* [1949] A.C. 386, [1949] 2 All ER 150, P.C.), other actions based on the breach of either a duty of care or a statutory duty. The tort of negligence is also available. In this respect we have to consider the well-known decision of the House of Lords in *Donogue v Stevenson* [1932] A.C. 562, HL, where Lord Atkin explained the nature of the duty of care in the following words: “A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take a reasonable care” (at 599).

<sup>1457</sup> The 1987 Act was enacted in order to implement the EC Directive on Product Liability 85/374/EEC (Directive of the Council of the European Communities, dated 25th July 1985, (No. 85/374/EEC) on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products), and to impose a strict liability on producers of goods that prove to be defective and which cause damage to person or, in some circumstances, property, subject to certain defences (See B.W. *Harvey and D.L. Parry*, “The law of consumer protection and fair trading”, Butterworths, London, Edinburgh & Dublin, 2000). The Directive has been recently amended by Directive 1999/34/EC which has been implemented in UK by, the Statutory Instrument 2000 No. 2771. The Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000, and in Italy by the Legislative Decree February 2<sup>nd</sup> 2001, No. 25 “Attuazione della direttiva 1999/34/EC, che modifica la direttiva

for defective products – identifies three classes of persons which can be liable for damages caused by defective products.<sup>1458</sup> Section 3 provides criteria for identification of defectiveness, and in particular it makes clear that “there is a defect in a product ... if the safety of the product is not such as persons generally are entitled to expect; and for those purposes “safety”, in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury”.<sup>1459</sup> The concept of damage giving rise to liability is then defined in section 5; section 4 provides a number of defences, while section 7 establishes a prohibition on exclusions from liability.

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85/374/EEC, in materia di responsabilità per danno da prodotti difettosi”, published *Gazzetta Ufficiale* n. 49 of February 28th 2001. Section 1 (2) provides several definitions relevant for the present purpose. A producer is defined in relation to a product as: (a) the person who manufactured it; (b) in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it; (c) in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out (for example, in relation to agricultural produce), the person who carried out that process. According to Section 1 (2) a product, finally, includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise.

<sup>1458</sup> Subsection 2 then specified that the section applies to: (a) the producer of the product; (b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product; (c) any person who has imported the product into a member state from a place outside the member states in order, in the course of any business of his, to supply it to another. (3) Subject as aforesaid, where any damage is caused wholly or partly by a defect in a product, any person who supplied the product (whether to the person who suffered the damage, to the producer of any product in which the product in question is comprised or to any other person) shall be liable for the damage if: (a) the person who suffered the damage requests the supplier to identify one or more of the persons (whether still in existence or not) to whom subsection (2) above applies in relation to the product; (b) that request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and (c) the supplier fails, within a reasonable period after receiving the request, either to comply with the request or to identify the person who supplied the product to him. (5) Where two or more persons are liable by virtue of this Part for the same damage, their liability shall be joint and several. (6) This section shall be without prejudice to any liability arising otherwise than by virtue of this Part.

<sup>1459</sup> Subsection 2 then contains a list of the circumstances that shall be taken into account in order to determine what persons generally are entitled to expect in relation to a product. Some of these factors has been considered in two recent cases: *Richardson v LRC Products Ltd*, 2 February 2000, QBD, (2000) 23 Consumer Law Today, Issue 4, p. 3; *Worsley v Tambrands* (2000) 23 Consumer Law Today, Issue 5, pag. 1, QBD.

**429. The Consumer Protection (Distance Selling) Regulations 2000**<sup>1460</sup> These regulations were enacted to implement Directive 97/7/EC.<sup>1461</sup> The aim of both the directive and the regulations is to ensure that the consumer gets good information prior to the contract being made and also giving the consumer a right to cancel the contract during the subsequent cooling off period. The first issue is addressed in Regulations 7 and 8, which contain a list of the information required prior to the conclusion of the contract and that which has to be provided in writing. The Regulations are applicable to the distance selling contracts specified in Regulations 4-7. They provide a list of information which the supplier should communicate to the consumer<sup>1462</sup> before the conclusion of the contract.

**430. The Sale and Supply of Goods to Consumers Regulations 2002**<sup>1463</sup> These Regulations, which came into force on March 31<sup>st</sup>, 2003, amend the existing legislation on the sale and supply of goods and unfair terms in order to provide additional remedies to consumers in certain circumstances. They also contain provisions on the legal status of guarantees offered to consumers and place obligations on guarantors in relation to such guarantees.

**(cc) Liability for prospectuses**

**431. Regulation of prospectuses and listing particulars** As part of developments at a European level, since 1979 a set of directives has been enacted with the aim of establishing a European capital market.<sup>1464</sup> In the UK the issue is nowadays covered

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<sup>1460</sup> S.I. 2000 No. 2234.

<sup>1461</sup> Directive 97/7/EC has been recently amended by Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, which has to be implemented no later than October 9 2004.

<sup>1462</sup> According to Section 3 (1) "consumer" means any natural person who, in contracts to which these Regulations apply, is acting for purposes which are outside his business.

<sup>1463</sup> S.I. 2002 No. 3045).

<sup>1464</sup> These are: i) the Directive coordinating the conditions for the admission of securities to official stock exchange listing (No. 79/279/EEC of 5 March 79; OJ No. L66) – the "*Admission Directive*"; ii) the Directive coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing (No. 80/390/EEC of 17.3.80; OJ No. L100) – the "*Listing Particular Directive*"; iii) the Directive on information to be published on a regular basis by companies the shares of which have been admitted to official stock exchange listing (No. 82/121/EEC of 15 February 1985; OJ No. L48) – the "*Interim Reports Directive*"; iv) the Council Directive coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public (No. 89/298/EEC of 17.4.1989; OJ No. L124) – the "*Prospectus Directive*" which has been amended by the Directive 90/211/EEC; v) Finally, in May 2002, there has been a proposal for a New Prospectus Directive (COM (2002) 460 Final (political agreement by the EU Council reached 5/5/2002)). In so far as the information to be provided to the public are concerned, the system introduced by these

by the Financial Services and Markets Act 2000, which contains several provisions dealing with both the content of the prospectus and the liabilities which may arise in the event of misleading information. Implementation of the legislative framework is completed with The Public Offers of Securities Regulation of 1995 (SI 1995/1537) – POS Regulations. The system in the United Kingdom provides two different means by which the information should be disclosed: prospectus and listing particulars.<sup>1465</sup> The main provision of the FSMA dealing with the disclosure of information in the prospectus of listed securities is section 80 dealing – with the *general duty of disclose in listing particular*.<sup>1466</sup> The offer to the public of unlisted securities is ruled by the Public

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directives can be summarised as follows. First, the Prospectus Directive expressly applies only to (art. 1): i) transferable securities; ii) offered to the public for the first time in a member state; iii) provided that these securities are not already listed on a stock exchange in that member state. Consequently, it does not apply either where securities are not offered for the first time or where they are already listed on a stock exchange. Second, the content of the information to be provided to the public will vary in accordance with the situation concerned. Accordingly to Art. 7 and 11 of the Prospectus Directive, whenever securities are in the process to be admitted to the stock exchange, the content of the prospectus should be determined in conformity with the provisions of the Listing Particular Directive; on the other hand, if this is not the case, the content of the prospectus in the one established in the Prospectus Directive. See *B. Pettet*, “Company Law, Pearson Education, London, para. 20. 4.

<sup>1465</sup> First, a prospectus has to be published in every case in which securities are offered to the public for the first time. A distinction has to be drawn between cases in which an application for listing has been made and the ones in which it does not occur. In the first case, Section 84 (1) of the FSMA establishes that “listing rules must provide that no new securities for which an application for listing has been made may be admitted to the official list unless a prospectus has been submitted to, and approved by, the competent authority and published. In the latter case, Regulation 4 of the POS Regulations, reads: “When securities are offered to the public in the United Kingdom for the first time the offeror shall publish a prospectus by making it available to the public, free of charge, at an address in the United Kingdom, from the time he first offers the securities until the end of the period during which the offer remains open”. There are, nevertheless, some cases in which there is no need to publish a prospectus but merely a document called listing particulars, required for securities which want to be admitted to the official list. This is the case whenever no securities are offered to the public within the meaning of the Prospectus Directive (e.g. when there is an offer to a small number of institutional investors).

<sup>1466</sup> Section 80 reads: “(1) Listing particulars submitted to the competent authority under section 79 must contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of: (a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities; and (b) the rights attaching to the securities. (2) That information is required in addition to any information required by: (a) listing rules, or (b) the competent authority, as a condition of the admission of the securities to the official list. (3) Subsection (1) applies only to information: (a) within the knowledge of any person responsible for the listing particulars; or (b) which it would be reasonable for him to obtain by making enquiries. (4) In determining what information subsection (1) requires to be included in listing

Offers of Securities Regulations 1995 – S.I. 1995 No. 1537 (“POS Regulation”).<sup>1467</sup> Regulation 8 prescribes the form and content of the prospectus<sup>1468</sup> while Regulation 9

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particulars, regard must be had (in particular) to: (a) the nature of the securities and their issuer; (b) the nature of the persons likely to consider acquiring them; (c) the fact that certain matters may reasonably be expected to be within the knowledge of professional advisers of a kind which persons likely to acquire the securities may reasonably be expected to consult; and (d) any information available to investors or their professional advisers as a result of requirements imposed on the issuer of the securities by a recognised investment exchange, by listing rules or by or under any other enactment. The detailed requirements for the content of the prospectus for the admission of shares are then set out in Chapter VI of the Listing Rules. Even though a full list of all the information required to be disclosed falls outside the purpose of the present research, it must be nevertheless taken into account that the required information are considered under seven headings: a) the persons responsible for the prospectus the auditors, and other advisers; b) the shares for which application is being made; c) the issuer and its capital; d) the group’s activities; e) the issuer’s assets and liabilities, financial position and profit and losses; f) the management; g) the recent development and prospects of the group. Chapter XII than rules accountants’ reports and financial information. Section 81 and paras. 5.14 – 5.16 of the Listing Rules, finally, deal with supplementary prospectus.

<sup>1467</sup> Regulation 3 (*Investments to which this Part applies*) establishes that the Regulations apply to any investment which is not admitted to official listing, nor is the subject of an application for listing, in accordance with Part VI of the Act; and is of a kind specified in paragraph (2). According to Regulation 5 – *Offers of securities* – an offer of securities when “a person ... as principal: (a) ... makes an offer which, if accepted, would give rise to a contract for the issue or sale of the securities by him or by another person with whom he has made arrangements for the issue or sale of the securities; or (b) ... invites a person to make such an offer; but not otherwise”.

<sup>1468</sup> Regulation 8 – *Form and content of prospectus*: (1) Subject to regulation 11 and to paragraphs (2), (4), (5) and (6), a prospectus shall contain the information specified in Parts II to X of Schedule 1 to these Regulations (which shall be construed in accordance with Part I of that Schedule). (2) Where the requirement to include in a prospectus any information (the “required information”) is inappropriate to the issuer’s sphere of activity or to the legal form of the issuer or the offeror or to the securities to which the prospectus relates, the requirement: (a) shall have effect as a requirement that the prospectus contain information equivalent to the required information; but (b) if there is no such equivalent information, shall not apply. (3) The information in a prospectus shall be presented in as easily analysable and comprehensible a form as possible. (4) Where, on the occasion of their admission to dealings on an approved exchange, shares to the Act are offered on a pre-emptive basis to some or all of the existing holders of such shares, a body or person designated for the purposes of this paragraph by the Treasury shall have power to authorise the omission from a prospectus subject to this regulation of specified information provided that up-to-date information equivalent to that which would otherwise be required by this regulation is available as a result of the requirements of that approved exchange. In this paragraph, “specified information” means information specified in paragraphs 41 to 47 of Schedule 1 to these Regulations. (4A) In determining for the purposes of paragraph (4) whether information is equivalent to that specified in paragraph 45 of Schedule 1, there shall be disregarded: (a) the requirements of sub-

sets out a general duty of disclosure in the prospectus.<sup>1469</sup> Finally, regulation 10 establishes in which circumstances a supplementary prospectus is needed. Both FSMA 2000 and the POS Regulation contain provisions dealing with prospectus liability.<sup>1470</sup> A recent case has also analysed the liability which may arise in the aftermarket.<sup>1471</sup>

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paragraphs (1)(a)(i), (1)(a)(iv), (1)(b)(iii), (2)(a)(ii), (2)(a)(iv) and (8)(b) of that paragraph; and (b) any requirement of sub-paragraphs (10)(a), (10)(b) or (11)(c) to include a statement by the person responsible for the interim accounts or report. (5) Where a class of [shares] has been admitted to dealings on an approved exchange, a body or person designated for the purposes of this paragraph by the Treasury shall have power to authorise the making of an offer without a prospectus, provided that: (a) the number or estimated market value or the nominal value or, in the absence of a nominal value, the accounting par value of the shares offered amounts to less than ten per cent of the number or of the corresponding value of shares of the same class already admitted to dealings; and (b) up-to-date information equivalent to that required by this regulation is available as a result of the requirements of that approved exchange. (6) Where a person: (a) makes an offer to the public in the United Kingdom of securities which he proposes to issue; and (b) has, within the 12 months preceding the date on which the offer is first made, published a full prospectus relating to a different class of securities which he has issued, or to an earlier issue of the same class of securities, he may publish, instead of a full prospectus, a prospectus which contains only the differences which have arisen since the publication of the full prospectus mentioned in sub-paragraph (b) and any supplementary prospectus and which are likely to influence the value of the securities, provided that the prospectus is accompanied by that full prospectus and any supplementary prospectus or contains a reference to it or them; and, for this purpose, a full prospectus is one which contains the information specified in Parts II to X of Schedule 1 (other than any information whose omission is authorised by or under paragraph (2) or (4) or regulation 11).

<sup>1469</sup> Regulation 9 – *General duty of disclosure in prospectus*: (1) In addition to the information required to be included in a prospectus by virtue of regulation 8 a prospectus shall (subject to these Regulations) contain all such information as investors would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of: (a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities; and (b) the rights attaching to those securities. (2) The information to be included by virtue of this regulation shall be such information as is mentioned in paragraph (1) which is within the knowledge of any person responsible for the prospectus or which it would be reasonable for him to obtain by making enquiries. (3) In determining what information is required to be included in a prospectus by virtue of this regulation regard shall be had to the nature of the securities and of the issuer of the securities. (4) For the purposes of this regulation “issuer”, in relation to [a certificate or other instrument representing securities], means the person who issued or is to issue the securities to which the certificate or instrument relates.

<sup>1470</sup> *Prospectus liability for listed securities*: similarly to the previous regime set out in Section 150 of the Financial Services Act 1986, Section 90 – *Compensation for false or misleading particulars* – of the FSMA 2000 reads: (1) Any person responsible for listing particulars is liable to pay compensation to a person who has: (a) acquired securities to which the particulars apply; and (b) suffered loss in respect of them as a result of: (i) any untrue or misleading statement in the particulars; or (ii) the omission from the particulars of any matter required to be included by section 80 or 81. (2) Subsection (1) is subject to exemptions provided by Schedule 10. (3) If

**432. Auditors' liability** Liability of auditors is mainly related to the information they provide through audit reports. These are public documents and a range of people having dealings with the audited company (e.g. shareholders,<sup>1472</sup> investors, creditors, guaran-

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listing particulars are required to include information about the absence of a particular matter, the omission from the particulars of that information is to be treated as a statement in the listing particulars that there is no such matter. (4) Any person who fails to comply with section 81 is liable to pay compensation to any person who has: (a) acquired securities of the kind in question; and (b) suffered loss in respect of them as a result of the failure. (5) Subsection (4) is subject to exemptions provided by Schedule 10. (6) This section does not affect any liability which may be incurred apart from this section. (7) References in this section to the acquisition by a person of securities include references to his contracting to acquire them or any interest in them. (8) No person shall, by reason of being a promoter of a company or otherwise, incur any liability for failing to disclose information which he would not be required to disclose in listing particulars in respect of a company's securities: (a) if he were responsible for those particulars; or (b) if he is responsible for them, which he is entitled to omit by virtue of section 82. (9) The reference in subsection (8) to a person incurring liability includes a reference to any other person being entitled as against that person to be granted any civil remedy or to rescind or repudiate an agreement. (10) "Listing particulars", in subsection (1) and Schedule 10, includes supplementary listing particulars. *Prospectus liability for unlisted securities*: in so far as liability for misleading information in the offer of non listed securities is concerned, regulations 13 to 15 must be taken into account. Regulation 13 clarifies which are the persons responsible for prospectus, while Regulation 14 sets out the conditions for a compensation for false or misleading prospectus to arise. Regulation 15, finally, deals with exemption from liability to pay compensation.

<sup>1471</sup> *Prospectus liability in the after market*: The issue of establishing if liability of a promoting company may arise in relation to the after market has been recently considered in *Possfund Custodian Trustee Ltd v Diamond* [1996] 1 W.L.R. 1351; [1996] 2 B.C.L.C. 665; Times, April 18, 1996). Here some ten defendants applied to strike out an action for damages for misrepresentation in a prospectus. The plaintiffs were initial subscriber of the prospectus, but some of them also purchased shares subsequent to the initial flotation in reliance to the prospectus. According to the plaintiffs those responsible for drawing up the prospectus owed a duty of care to all purchasers in the unlisted "aftermarket" and had misrepresented the defendant's position by failing to state its liabilities. The Judges, refusing the applications, held that the plaintiffs' pleadings had shown an arguable case that the scope of the duty of care owed was not only confined to the initial subscriber but also extended to subsequent purchasers, since the aim of a prospectus was also to induce purchasers in the aftermarket. According to them it had to be shown objectively that it was the defendants' intention that later purchasers would rely on the representations made in the prospectus and also that the defendants had established a sufficient degree of proximity by such reliance. The question if the legislation governing the issue of securities meant that listing particulars should be regarded as intended to protect the after-market purchases, cannot be regarded as an easy one, given the reliance of *Caparo* in *Al-Nakib*, the wide and indeterminate class of individuals who might amount a claim on this basis.

<sup>1472</sup> Where accounts are negligently audited it is clear that the auditors are in breach of duty to the company. The company will therefore be allowed to sue them in contract, being at least an

tors, directors)<sup>1473</sup> may rely upon them. The leading case dealing with the auditors' duty of care is *Caparo Industries plc v Dickman*.<sup>1474</sup> In this decision the House of Lords held that the scope of an auditor's duty is limited not only by reference to persons, to those to whom it is known that the report will be communicated, but also by reference to the known purpose for which the audit report was supplied. Therefore no duty will be owed to an individual relying on the report for any other purpose, however foreseeable.<sup>1475</sup> The decision made clear that, in absence of any special statutory provision governing the audit, the purpose of the report did not include that of enabling shareholders or anyone else to make informed investment decisions. Lords Bridge and Oliver in *Caparo* expressly approved the reasoning of Millet J in the case of *Al Saudi Banque v Clark Pixley*<sup>1476</sup> where he established that the auditors owed no duty of care to a bank lending money to a company because there was "no specific relationship between the function the (auditor) is requested to perform and the transaction in relation to which the (bank) says it has relied on the proper performance of that function". It was held that it is not part of the purpose of the audit report to enable lenders to take decisions as to the advancement of credit. Two points must be noticed: first, an auditor owes a duty of care to its corporate client in both contract and tort<sup>1477</sup> (*Henderson v Merret Syndicates Ltd*); second, we have to look at the condition for liability set out by Lords Bridge and Oliver in *Caparo*: where there is clear evidence that the auditor knows, as opposed to foresees, that his report is likely to be used by an identified person for a particular purpose, a duty may be owed in respect of losses incurred as a result of that use. A number of subsequent cases applied the *Caparo test*.<sup>1478</sup>

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implied term in the contract that the audit be conducted with reasonable care and skill (Section 13 of the Supply of Goods and Services Act 1982). It may be that the same duty will be owed in tort, though this point is unlikely to be of practical importance except in those cases where limitation of actions occurs. Note that Section 310 of the Companies Act 1985, makes void any terms in an agreement between a company and its auditors under which the company agrees to exclude or limit any liability of the auditor for breach of duty in connection with the conduct of the audit.

<sup>1473</sup> A question which has not been yet solved by the case law concern the extent to which directors who have been held liable as a result of errors in the accounts can pass any of that liability on the auditors.

<sup>1474</sup> *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, [1990] 1 All ER 568, HL.

<sup>1475</sup> In *Caparo*, although it was foreseeable that shareholders and others might rely on the audit report when making decisions to purchase further shares in the company, no duty of care was owed to them because the House of Lords held that the purpose of the report was restricted by the statute to enabling shareholders to exercise their proprietary interests in the management of the company.

<sup>1476</sup> *Al Saudi Banque v Clark Pixley* [1990] Ch 313.

<sup>1477</sup> *Henderson v Merret Syndicates Ltd* [1995] 2 A.C. 145.

<sup>1478</sup> *McNaughton v Hicks Anderson* [1991] All ER. 134, C.A.; *Morgan Crucible v Hill Samuel* [1991] 1 All ER. 148 C.A.; *Berg v Mervyn Hampton Adams*; *Barings plc v Cooper & Lybrand* [1997] PNLR 179, CA., in *Bank of Credit and Commerce International (overseas) Ltd v Price Waterhouse* [1998] 15 LS Gaz R 32, CA. and in *Anthony v Wright* [1994] The Independent, 27 September.

**433. Regulators' liability**<sup>1479</sup> The *Banking Act 1987*<sup>1480</sup> and the *Financial Market and Services Act 2000*<sup>1481</sup>, contain a similar statutory immunity respectively for the Bank of England and for the FSA.<sup>1482</sup> Schedule 1, paragraph 19 (1) of the FSMA provided both the FSA and "any person who is, or is acting as, a member or officer or member of staff of the Authority" with a broad immunity for actions in damages. The immunity conferred to the FSA suffers one limitation and two exceptions. The limitation is that it applies only to acts or omissions "done in the discharge, or purported discharge, of the Authority's functions". Furthermore, the immunity does not apply "if the act or omission is shown to have been in bad faith; or, so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6 (1) of the Human Rights Act 1998".<sup>1483</sup> The immunity conferred to

<sup>1479</sup> The issue of regulators' liability under English law has been deeply analysed in the last years especially after the *Three Rivers* case dealing with the liability of the Bank of England for its negligent supervision on the BCCI under the relevant provisions of the *Banking Act 1987*.

<sup>1480</sup> Section 1 (4) *Banking Act 1987*.

<sup>1481</sup> Schedule 1, Section 19 (1) of the *Financial Services and Markets Act 2000*.

<sup>1482</sup> Consequently, most of the arguments adopted by the *House of Lords* in the *Three Rivers District Council and others v Governor and Company of the Bank of England* (*House of Lords*, case *Three Rivers District Council and others v Governor and Company of the Bank of England* [2000] 2 W.L.R. 1220; *Three Rivers District Council and others v Governor and Company of the Bank of England* [2001] UKHL 16) decision can be extended to the FSA. This makes it possible to foresee how courts will deal with the issue of the FSA's liability for negligent supervision in the field of the financial market. Similar regulatory immunity are contained in: Section 48 of the *Companies Act 1989* (auditors' regulators); Section 1 (4) of the *Pensions Act 1995* (Occupational Pensions Regulatory Authority); Section 14 of the *Lloyd's Act 1982*. In the FSMA similar immunity is contained in Sections 102 (immunity when the FSA acts as a "competent authority"), 222 (immunity of compensation scheme manager), 291 (immunity of RIEs and RCHs) and, finally, in Schedule 17, paragraph 10 (immunity of ombudsman).

<sup>1483</sup> Some authors argued that the immunity conferred to the FSA may be contrary to EC Law (C. Proctor, *Financial Regulators – risk and liabilities: Part 1*, B.J.I.B. & F.L. 2002, 17 (1),19) and to the European Convention on Human Rights (Here the issue arises because the immunity may breach the right of access to the court under Art. 6 (1). See: C. Proctor, *Financial Regulators – risk and liabilities: Part 1*, B.J.I.B. & F.L. 2002, 17 (1),19; J. Coffey and T. Pinto, *The compatibility of the Financial Services and Markets Act 2000 with the Human Rights Act 1998*, I.C.C.L.R. 2001, 12 (2), 50-56; R. Clayton, *Article 6 of the ECHR and financial services*, J. Int'l Fin. Mkt. 2001, 3 (4), 143-148; A. Alcock, *The European Convention: another incoming tide*, Comp. Law. 2000, 21 (2), 34-35; A. Page, *The Financial Services and Market Act and the European Convention on Human Rights*, J. Int'l Fin. Mkt. 2000, 2 (5), 199-203; M. Rose and G. Davies, *The Financial Services and Markets Bill and Human Rights*, CCH Editions Limited, 1999, at pp. 19). Under English law the liability of public bodies is governed both by the ordinary rules of tort law (*Mersey Docks Trustees v Gibbs* (1866) L.R. 1 H.L. 93 (H.L.); *Geddis v Proprietors of Bann Reservoir* (1878) L.R. 3 App. Cas. 430 (H.L.(I.) and certain special tort regimes which apply only to administrative activities of the public authorities (e.g. the tort of misfeasance in public office). Furthermore, public authorities receive an additional degree of protection from the common law. In cases involving the tort liability in negligence of the

the FSA does not cover action in damages deriving from acts or omission committed in bad faith. Consequently, regulators' liability may only arise if the impugned act or omission constitutes misfeasance in public office or some other intentional torts involving the mental element of bad faith. In the *Three Rivers* case the House of Lords, dealing with the alleged misfeasance by the Bank of England in supervising the BCCI, set out the concrete elements of the tort of misfeasance in public office. In the first

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public authorities the courts have developed several public law hurdles (See M. Andenas and D. Fairgrieve, "Sufficiently serious? Judicial restraint in tortious liability of public authorities and the European influence", in M. Andenas (ed.), *English Public law and the common law of Europe*, London, 1998 and B.S. Markesinis, J.-B. Auby, D. Coester-Waltjen and S.F. Deakin, *Tortious liability of statutory bodies: a comparative and economic analysis of five English cases*, Hart Publishing, Oxford, 1999) which, adding further elements to the ordinary rules of negligence, make really unlikely the imposition of a duty of care over public authorities. First, the *policy/operational dichotomy*, applied by English courts since the case of *Anns v Merton London Borough Council* ([1978] A.C. 728) and developed in successive judgements (See judgements: *Rowling v Takaro Properties Ltd.* [1988] A.C. 473 (P.C.); *X (Minors) v Bedfordshire County Council* [1995] 2 A.C. 633; *Stovin v Wise and Norfolk County Council* [1996] A.C. 923; *Barret v Enfield London Borough Council* [1998] Q.B. 367, 378; *W v Essex County Council* [1998] 3 All ER 111, 125), in separating justiciable decisions from the ones which are not, suggests that is inappropriate for certain administrative decisions to be adjudicated upon negligence actions. The rationale lying behind this scenario is that the recognition of private rights of action in the context of policy decisions by public authorities "can have the perverse effect of shifting the focus of the decision-making process from consideration of public interest towards common-law duties of care owed to private parties" (C. Hadjiemmanuil, *Banking regulation and the Bank of England*, L.L.P. 1996, especially chapter 5, pp. 353. See judgement of *Home Office v Dorset Yacht Co. Ltd.* [1970] A.C. 1004 (H.L.). Furthermore, even in the case of a decision being justiciable according to the *policy/operational dichotomy*, a further burden on the plaintiff is provided by the condition for liability that the public authority's action was *ultra vires* (It is important to point out that the proof of an act to be *ultra vires* does not automatically imply imposition of a duty of care). In cases dealing with the regulators' liability the issue of establishing a duty of care over public authorities faces two further obstacles. First, in all these cases the plaintiff suffers a pure economic loss. Secondly, in the field of regulators' liability for damages suffered by members of the public as a consequence of negligent supervision, the act or omission of the regulator is not an immediate cause of the damage suffered by the plaintiff. In these cases "the imposition of liabilities in this situations implies that the defendant, even though he has not been himself the source of the fresh damage to the plaintiff, was nevertheless under a responsibility to come to latter's rescue" (C. Hadjiemmanuil, *Banking regulation and the Bank of England*, L.L.P. 1996, especially chapter 5, pp. 342). The restrictive approach adopted by the English courts in cases involving the imposition of a duty of care on public authorities is confirmed in the field of regulatory supervision. (For some case law on the liability of regulators for negligence see: *Yuen Kun Yeu v AG of Hong Kong* [1988] A.C. 175; [1987] 3 W.L.R. 776; [1987] 2 All ER 704 (P.C.); *Minories Finance Ltd v Arthur Young* [1989] 2 All ER 105; [1988] FLR 345; *Davies v Radcliffe* [1990] 2 All ER 536 (P.C.); *Lonhro v Tebbit* [1992] 4 All ER 280 (CA).

hearing,<sup>1484</sup> the House of Lords dealt with two questions of law: *i*) to define the exact ingredients of the tort of misfeasance in public office; *ii*) to decide if the Bank of England is capable of being liable in damages to depositors for violation of the First Banking Directive. In the House of Lords, Lord Steyn considered the six ingredients of the tort of misfeasance in public office: *i*) the defendant must be a public officer; *ii*) there must be an exercise of power as a public officer; *iii*) there must be the bad faith of the defendant; *iv*) there must be a duty to the plaintiff; *v*) there must be causation and, *vi*) there must be a damage and the requirement of remoteness.<sup>1485</sup> In the second hearing,<sup>1486</sup> the House of

<sup>1484</sup> *Three Rivers DC v Bank of England* [2000] 3 All ER 1, [2000] 2 W.L.R. 1220.

<sup>1485</sup> The first two requirements do not create any particular issue. Dealing with the third element of the tort of misfeasance in public office, the House of Lords held that the tort involves an element of bad faith of a public officer which may arise in two different forms: *targeted malice*, when he exercises his power specifically intending to injure the plaintiff (*Bourgoïn S.A. v. M.A.F.F.* [1986] Q.B. 716, 776. See also *Dunlop v Woollahra Municipal Council* [1982] A.C. 158, 172); *untargeted malice*, when the public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. Before the House of Lords the focus was on the second of the two forms. It creates two different kind of issues, the definition of the public officer's knowledge of the unlawfulness of his act and his awareness of the consequences of that unlawful act. On the knowledge of illegality the solution provided by the House of Lords in the first hearing was that the plaintiff must prove either that the officer acted with the *actual knowledge* of, or with *reckless indifference* to, the illegality of his act. On the second issue – the awareness of consequences – the House of Lords reject the test of reasonable foreseeability and established that the relevant test was the subjective one. The plaintiffs had to prove that the public officer either knew that his act would probably injure the claimant, or a person of a class of which the claimant was a member, or that he acted with a reckless indifference as to the consequences (*i. e.*: without caring whether the consequences happened or not). According to Lord Steyn, the fourth requirement – the duty to the plaintiff – was the key to establish “who can sue in respect of an abuse of power by a public officer”. In Lord Steyn's opinion the existence of this requirement should be found on a case by case approach, taking into consideration the fact that “any plaintiff must have a sufficient interest to found a legal standing to sue”. According to his opinion the principle did not require the introduction of the requirement of proximity because the state of mind required to establish the tort and the special rule of remoteness appeared sufficient to keep the tort “within reasonable bounds”. On the field of causation the House of Lords simply clarifies that it is a question of fact unsuitable for summary determination. As far as the requirement of damage and remoteness is concerned, the House of Lords had to decide between two different interpretations. The plaintiffs, basing their claim on the powerfully reasoned dissenting judgement by Auld L.J., argued that they should be able to recover all reasonably foreseeable losses suffered by them. The Bank, supported the conclusion that recovery should be allowed only for losses foreseen by the public officer or for losses to which he was recklessly indifferent to. The House of Lords held that only losses which had been foreseen by the public officer as a probable consequence of his act were recoverable and that this criterion struck out an appropriate balance providing adequate protection for the public and protecting public officers from unmeritorious claims. According to Lord Steyn “the rationale of the tort is that in legal system based on the rule of law executive or administrative power may be exercised only for public good and not for ulterior and

Lords, dealing with the question of striking out of the claim pleaded for the tort of misfeasance in public office, decided that depositors may succeed in their claim on the assumption that all the factual allegations of their pleading could be proved.

**434. Takeovers** There are different sources of law which, to different extent, affect the discipline of takeovers within the United Kingdom.<sup>1487</sup> The main source for the control of takeovers is, nevertheless, provided by the City Code on Takeovers and Mergers.<sup>1488</sup> In its Introduction (paragraph 4) the Code establishes which are the companies and the transactions which fall within its ambit. The Code is composed of 10 principles and 38 rules. Principles are mainly concerned with the information to be provided to shareholders and the responsibility of the board of directors. Rule 2 of the Code deals with the announcements. It stresses the importance of absolute secrecy before an announcement is made.<sup>1489</sup> The content of the announcement to make an offer is

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improper purpose” (1230). The second issue addressed by the House of Lords in the first hearing was whether the Bank of England was capable of being liable in damages for violation of the First Banking Directive. The main speech on the community law issue was given by Lord Hope of Craighead. In his judgement Lord Hope set out two critical questions namely, whether the Directive of 1977 entails the grant of rights to individual depositors and potential depositors and whether the content of those rights is identifiable on the basis of the provisions of the directive. Lord Hope undertook a detailed analysis of both the European Court’s case law and the terms of the First Banking Directive. In his opinion the recitals clarified that the directive was merely intended to be first step in a process designated to co-ordinate the supervision of credit institution. Lord Hope agreed with the opinion expressed by Clarke J [1996] 3 All ER 558, 616, where he said that “the Directive was not intended to require an imposition of a duty to supervise upon the supervisory authority because ... the immediate purpose of the Directive ... was a first step towards the harmonisation of the systems in the member states ... Its purpose was not to lay down the duty to supervise or radically to alter existing systems, but, even if it was, it was not ... to confer rights upon either savers or other creditors”. Thus, the plaintiffs’ claim under community law failed (For a deep analysis of the regulator liability in EU law, see: M. Andenas, *Misfeasance in public office, governmental liability, and European influences*, I.C.L.Q., vol. 51, October 2002, pp. 765-768).

<sup>1486</sup> *Three Rivers DC v Bank of England* [2001] UKHL 16; [2001] All ER. 513 (HL).

<sup>1487</sup> The Companies Act 1985 (eg. Sections 428-430 F), both the domestic and European legislation on mergers control, the common law, the equitable rules and, finally, the ordinary law of contract and tort, affect the legal regulation of takeovers. See Charlesworth & Morse, “Company Law”, Sweet & Maxwell, 1999, London, p. 601-603.

<sup>1488</sup> The Code is administered by the City Panel which is an autonomous body instituted by the Bank of England. The Panel works on a day-to-day basis through its executive, headed by the director general.

<sup>1489</sup> Rule 2.2 clarifies that an announcement is required: “(a) when a firm intention to make an offer (the making of which is not, or has ceased to be, subject to any pre-condition) is notified to the board of the offeree company from a serious source, irrespective of the attitude of the board to the offer; (b) immediately upon an acquisition of shares which gives rise to an obligation to make an offer under Rule 9. The announcement that an obligation has been incurred should not be delayed while full information is being obtained; additional

described in rule 2.5.<sup>1490</sup> A copy of the relevant announcement or a synthesis of the terms and conditions of the offer must be sent by the offeree to its shareholders and to the Panel after the beginning of the offer period (regulation 2.6). Furthermore, after the announcement of an offer, this must be published according to rule 2.9. The offeror has to make a further announcement on the first business day after the due expiry date, or

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information can be the subject of a later supplementary announcement; (c) when, following an approach to the offeree company, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price; (d) when, before an approach has been made, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the potential offeror's actions (whether through inadequate security or otherwise) which have led to the situation; (e) when negotiations or discussions are about to be extended to include more than a very restricted number of people (outside those who need to know in the companies concerned and their immediate advisers). An offeror wishing to approach a wider group, for example in order to arrange financing for the offer (whether equity or debt), to seek irrevocable commitments or to organise a consortium to make the offer should consult the Panel; or (f) when a purchaser is being sought for a holding, or aggregate holdings, of shares carrying 30% or more of the voting rights of a company or when the board of a company is seeking one or more potential offerors, and: (i) the company is the subject of rumour and speculation or there is an untoward movement in its share price; or (ii) the number of potential purchasers or offerors approached is about to be increased to include more than a very restricted number of people". The responsibility for making the announcement is on the offeror before the board of the offeree company is approached, as it will normally be the case even after the approaching.

<sup>1490</sup> According to Rule 2.5 "(a) The announcement of a firm intention to make an offer should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer. Responsibility in this connection also rests on the financial adviser to the offeror. (b) When a firm intention to make an offer is announced, the announcement must contain: (i) the terms of the offer; (ii) the identity of the offeror; (iii) details of any existing holding in the offeree company: (a) which the offeror owns or over which it has control; (b) which is owned or controlled by any person acting in concert with the offeror; (c) in respect of which the offeror has received an irrevocable commitment to accept the offer; (d) in respect of which the offeror holds an option to purchase; (e) in respect of which any person acting in concert with the offeror holds an option to purchase; (iv) details of any outstanding derivative reference to securities in the offeree company entered into by the offeror or any person acting in concert with it; (v) all conditions (including normal conditions relating to acceptances, listing and increase of capital) to which the offer or the posting of it is subject; (vi) details of any agreements or arrangements to which the offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke a pre-condition or a condition to its offer and the consequences of its doing so, including details of any break fees payable as a result; (vii) details of any arrangement of the kind referred to in Note 6(b) on Rule 8; and (viii) in cases where the offer is announced to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded, a summary of the provisions of Rule 8.3. (c) The announcement of an offer under Rule 9 should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy

after the offer becomes unconditional, or is revised or extended, failing to do so is subject to the sanctions provided by rule 17. 2. The content of the statement is described in rule 17. 1.<sup>1491</sup> The main provisions dealing with the information to be provided during an offer are the ones contained in rules 19, 20 and 23.<sup>1492</sup> Finally, rule 20 sets out the requirement of equality of information to be provided when dealing with shareholders,

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full acceptance of the offer. (The party confirming that resources are available will not be expected to produce the cash itself if, in giving the confirmation, it acted responsibly and took all reasonable steps to assure itself that the cash was available).

<sup>1491</sup> It must contain the total number of shares and rights over shares (as nearly as practicable): (a) for which acceptances of the offer have been received; (b) held before the offer period; and (c) acquired or agreed to be acquired during the offer period, and must specify the percentages of the relevant classes of share capital represented by these figures.

<sup>1492</sup> Rule 23 is the central provision dealing with the general obligation as to inform. It states that “shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of an offer. Such information must be available to shareholders early enough to enable them to make a decision in good time. The obligation of the offeror in these respects towards the shareholders of the offeree company is no less than an offeror’s obligation towards its own shareholders”. Rule 19.1 established that “every document or advertisement issued, or statement made, during the course of an offer must, as is the case with a prospectus, satisfy the highest standards of accuracy and the information given must be adequately and fairly presented”. Furthermore every advertisement or document issued to shareholders “must state that the directors of the offeror and/or, where appropriate, the offeree company accept responsibility for the information contained in the document or advertisement and that, to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case), the information contained in the document or advertisement is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the import of such information” (Rule 19. 2). The Panel’s consent is required in order to allow a director to be excluded from such a statement. Under the head “unacceptable statements”, Rule 19. 3 established that “parties to an offer or potential offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty. In particular, an offeror must not make a statement to the effect that it may improve its offer without committing itself to doing so and specifying the improvement”. There is a general prohibition to publish advertising connected with an offer unless: (i) product advertisements not bearing on an offer or potential offer (where there could be any doubt, the Panel must be consulted); (ii) corporate image advertisements not bearing on an offer or potential offer; (iii) advertisements confined to non-controversial information about an offer (e. g. reminders as to closing times or the value of an offer). Such advertisements must avoid argument or invective; (iv) advertisements comprising preliminary or interim results and their accompanying statement, provided the latter is not used for argument or invective concerning an offer; (v) advertisements giving information, the publication of which by advertisement is required or specifically permitted by the FSA Listing Rules; (vi) advertisements communicating information relevant to holders of bearer securities; (vii) advertisements comprising a tender offer under the SARs; (viii) advertisements which are notices relating to Court schemes; or (ix) advertisements published with the specific prior consent of the Panel. Rules 19. 5 and 19. 6 relate respectively to telephone

competing offerors or independent directors in management buy-outs. Rule 24 establishes the content of the offer document.<sup>1493</sup> Other provisions relating to the content of the document are set out in sub-rules 5 to 13 of rule 24. Rule 25 – *Offeree board circulars* – establishes the contents of the target company’s response. Rule 26 relates to the document that must be available for inspection from the time the offer document or offeree board circular is published until the end of the offer period. Finally rule 27 is concerned with the information to be provided to shareholders when a material change occurs to the published information during a bid.

**435. Consumer credit** The main statutory instrument in the United Kingdom dealing with consumer credit is the Consumer Credit Act 1974.<sup>1494</sup> The 1974 Act has not been

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campaigns and interviews. The parties must take care to ensure that any statements made during the competition reference period are capable of substantiation, because statement made during the competition reference may be asked by the Panel to be substantiated or withdrawn in the case in which the merger is allowed and the offeror announces a further offer (Rule 19.8).

<sup>1493</sup> The offeror is normally expected to cover: its intentions regarding the continuation of the business of the offeree company; its intentions regarding any major changes to be introduced in the business, including any redeployment of the fixed assets of the offeree company; the long-term commercial justification for the proposed offer; and its intentions with regard to the continued employment of the employees of the offeree company and of its subsidiaries. Rule 24.3 – *Shareholding and dealings* – requires the offeror to include in the offer document: (i) the shareholdings of the offeror in the offeree company; (ii) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company in which directors of the offeror are interested; (iii) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company which any persons acting in concert with the offeror own or control (with the names of such persons acting in concert); (iv) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or controlled by any persons who, prior to the posting of the offer document, have irrevocably committed themselves to accept the offer, together with the names of such persons; and (v) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or controlled by a person with whom the offeror or any person acting in concert with the offeror has any arrangement of the kind referred to in Note 6(b) on Rule 8. (b) If in any of the above categories there are no shareholdings, this fact should be stated. This will not apply to categories (a) (iv) or (v) if there are no such irrevocable commitments or arrangements. (c) If any party whose shareholdings are required by this Rule to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the period beginning 12 months prior to the offer period and ending with the latest practicable date prior to the posting of the offer document, the details, including dates and prices, must be stated. If no such dealings have taken place, this fact should be stated. According to Rule 24.4 the offer document must also include a report on the emoluments of the offeror directors will be affected by the acquisition or associated transactions.

<sup>1494</sup> In September 1968 the Crowther Committee was appointed to carry out a review of consumer credit. The Committee produced a report in two volumes in March 1971 (Cmnd 4596). It was followed two years later by a White Paper on “The Report of the Law on Consumer Credit”

created as a full comprehensive code. Indeed the ordinary law of contract governing consumers' credit agreements also applies to the formation of such contracts and misrepresentation. Furthermore, the hire-purchase terms in the Supply of Goods (Implied terms) Act 1973<sup>1495</sup> applies (sections 9 and 10). Section 8 of the 1974 Act defines Consumer credit agreements.<sup>1496</sup> Several provisions of the act deal with the information to be given to the public.<sup>1497</sup> Furthermore, Regulation 2 of the Consumer Credit (Agreements) Regulations (S.I. 1983/1553) sets out the form and content of regulated consumer credit agreements. Finally, sections 43-47 of the Consumer Credit Act 1974 deal with advertisements. As far as mortgage loans are concerned, these are regulated by the UK's Mortgage Code which came into effect for lenders into July 1997. The Mortgage Code is a voluntary code followed by lenders and mortgage intermediaries in their relations with personal customers.<sup>1498</sup> The Code is structured in the following

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(Cmnd 5427). Finally, the Consumer Credit Act was passed on July 1974, providing a legal framework to be implemented by means of regulations. The 1974 Act has been in some ways the basis for the first European directive dealing with consumer credit which was agreed in 1986 (Directive 87/102/EEC). Only few minor amendments have been necessary to implement the mentioned Directive within the United Kingdom. Also the implementation of Directive 90/88/EEC, which among other elements required additional information to be given in writing to consumers, was obtained by means of regulations. Finally, a further emending directive (Directive 98/7/EC), establishes a single method to calculate the APR. A deep consultation has been recently launched by the DTI in order to make the whole system more efficient.

<sup>1495</sup> As amended by Schedule 4 of the Consumer Credit Act 1974, the Unfair Contract Terms Act 1977 and the Sale and Supply of Goods Act 1994.

<sup>1496</sup> It reads: "(1) A personal credit agreement is an agreement between an individual ("the debtor") and any other person ("the creditor") by which the creditor provides the debtor with credit of any amount. (2) A consumer credit agreement is a personal credit agreement by which the creditor provides the debtor with credit not exceeding [£25,000]. (3) A consumer credit agreement is a regulated agreement within the meaning of this Act if it is not an agreement (an "exempt agreement") specified in or under section 16". The Act does not provide neither a full definition of credit nor of individual. Section 9 (1) – meaning of credit – simply states that "credit" includes a cash loan, and any other form of financial accommodation. Section 189 – definitions – simply clarifies that individual "includes a partnership or other unincorporated body of persons not consisting entirely of bodies corporate".

<sup>1497</sup> The more relevant for the present purpose are: Section 55 which deals with "Disclosure of information"; Section 57 (Withdrawal from prospective agreement); Section 58 (Opportunity for withdrawal from prospective land mortgage); Section 60 (Form and content of agreements); Section 61 (Signing of agreement); Section 62 (Duty to supply copy of unexecuted agreement); Section 63 (Duty to supply copy of executed agreement); Section 64 ("Duty to give notice of cancellation rights), and Section 69 (Notice of cancellation).

<sup>1498</sup> Section 13 of the Banking Code deals with loans. It establishes: "13.1 before we lend you any money or increase your overdraft, credit card limit or other borrowing, we will assess whether we feel you will be able to repay it. 13.2 If we offer you an overdraft, or an increase in your existing overdraft limit, we will tell you if your overdraft is repayable on demand. 13.3 If we cannot help you, we will explain the key reason why if you ask us to. We will give this in

way. First it sets out the 10 “Key Commitments”, which provide the standards of the Code. It follows a general part dealing with the marketing of mortgages and the principles to be followed when advising on the mortgage to be chosen. Part two, which applies only to lenders, deals with: lending, terms and conditions, charges, confidentiality, financial difficulties, complaints and, finally, monitoring and compliance. Part three applies only to mortgage intermediaries and establishes standards in the fields of: disclosure of status, fees and charges, terms and conditions, confidentiality, complaints and, finally, monitoring and compliance. Part four gives some final indications.<sup>1499</sup>

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writing if you ask. 13.4 If you want us to accept a guarantee or other security from someone for your liabilities, we may ask you for your permission to give confidential information about your finances to the person giving the guarantee or other security, or to their legal adviser. We will also: i) encourage them to take independent legal advice to make sure that they understand their commitment and the possible consequences of their decision (where appropriate, the documents we ask them to sign will contain this recommendation as a clear and obvious notice); ii) tell them that by giving the guarantee or other security they may become liable instead of, or as well as, you; and iii) tell them what their liability will be. We will not take an unlimited guarantee. Credit reference agencies 13.5 When you open your account, we will tell you when we may pass your account details to credit reference agencies and the checks we may make with them. 13.6 We may give information to credit reference agencies about the personal debts you owe us if: i) you have fallen behind with your payments; ii) the amount owed is not in dispute; and iii) you have not made proposals we are satisfied with for repaying your debt, following our formal demand. 13.7 In these cases, we will give you at least 28 days’ notice that we plan to give information about the debts you owe us to credit reference agencies. At the same time, we will explain to you the role of credit reference agencies and the effect the information they provide can have on your ability to get credit. 13.8 We may give credit reference agencies other information about the day-to-day running of your account if you have given us your permission to do so. 13.9 If you ask, we will tell you how to get a copy of the information that credit reference agencies have about you, or their leaflets that explain how credit referencing works. You should contact them direct”.

<sup>1499</sup> Section 1.1 of the Code establishes the 10 key commitments. According to them both lenders and mortgage intermediaries promise that they will: i) act fairly and reasonably in all their dealing with the borrower; ii) ensure that all services and products comply with the Code, even if they have their own terms and conditions; iii) give the borrower the information on their services and products in a plain language, and offer help if there is any aspect which he does not understand; iv) help the borrower to choose a mortgage that fits his needs, unless the borrower has already decided on his mortgage; v) help the client to understand the financial implication of a mortgage; vi) help the borrower to understand how his mortgage account works; vii) ensure that the procedures followed by the lender or mortgage intermediaries’ staff follow the commitments set out in the Code; viii) correct errors and handle complaints speedily; x) ensure that all services and products comply with relevant laws and regulations. In so far as advertisement of mortgage is concerned, section 2.2 establishes that all advertisings and promotional materials shall be clear, fair, reasonable and not misleading. At the fist contact with the consumer the lenders will provide the consumer with a copy of a leaflet entitled “You and Your Mortgage”, which summarises the Code’s key commitments and explains that there are three levels of service which may be provided under the Code. In advising the customer the

**(dd) Advertising**

**436. Misleading advertising** Within the United Kingdom, regulation and supervision of advertisements is effected by a system of self-regulation within a statutory framework as

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intermediaries shall take care to help the customer to select a mortgage which fits with his needs also by asking for relevant information about his circumstances and objectives. According to section 3.2 when providing information to help the client to choose a mortgage, the intermediaries should give the following information: i) an explanation of the main repayment methods the intermediaries offer (for example, repayment or interest only) and the repayment periods available; ii) for interest only mortgages: a general description of the types of investment (for example, endowment policy, pension plan) or other means which may be used to repay the mortgage; an explanation of the effect of failing to make suitable arrangements to repay the mortgage; information on whose responsibility it is to ensure that an adequate repayment method is in place. Your lender will remind you annually of the need to make sure that an adequate repayment method is in place; iii) an explanation that early repayment of a mortgage, early surrender of an investment, or changes in personal circumstances (for example, long-term sickness or relationship breakdown) can have adverse financial consequences, depending on the particular type of mortgage or investment; iv) a description of the types of interest rates available (for example, variable, fixed, discounted and capped rates); v) an explanation and illustration of future potential repayments at the end of any fixed, discounted or capped interest rate period, based on the relevant current variable mortgage interest rate; vi) a description of any insurance services which we can arrange (for example, buildings, contents, mortgage payment protection and life insurance); vii) whether it is a condition of the mortgage that such insurance be taken out and whose responsibility it is to ensure that it is taken out; viii) whether it is a condition of the mortgage that such insurance must be arranged by the intermediaries; ix) a general description of any costs, fees or other charges in connection with the mortgage which may be payable by the customer (for example, mortgage valuation fees, arrangement fees, early repayment charges, legal fees and insurance premiums); x) an explanation of whether the customers' selected mortgage terms (for example, a fixed interest rate) can be continued if you move house; xi) a description of when your account details may be passed to credit reference agencies; xii) if the customers' mortgage represents a high percentage of the price or valuation of his property (usually 75% or more), he may have to pay a high percentage lending fee. Some or all of this fee may be used by the lender, at its discretion, to obtain mortgage indemnity insurance to act as extra security for its sole benefit. If this is the case, the lender will give the customer a written explanation, stating that: such insurance will not protect him if your property is subsequently taken into possession and sold for less than the amount the customer owes; the client will remain liable to pay all sums owing, including arrears, interest and his lender's legal fees; if a claim is paid to the customers' lender under such insurance, the insurers generally have the right to recover this amount from him. Section 5 deals with "terms and conditions" and establishes the principle according to which all written terms and conditions will be fair in substance and will set out the customer's rights and responsibilities clearly and in plain language, with legal and technical language used only where necessary. In case terms and conditions have to be modified, the intermediaries assume an obligation to inform the customer how he will be notified of these changes giving reasonable notice before any change takes effect. In so far as interest rates are concerned, the

well as by the general law on contract, negligence, libel and intellectual property.<sup>1500</sup> Television and radio have been controlled through the Broadcasting Act since the start of commercial broadcasting in 1955. In 1961, in order to prevent similar statutory constraints being applied to advertising in other media, the industry developed a self-regulatory system.<sup>1501</sup> The two main statutory sources actually regulating the advertising

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intermediary has to tell the client: the interest rates which apply to his account and explain when interest is charged; whether the interest rate may be varied and, finally, when any capital repayments the customer makes will reduce the balance and the outstanding interest on his mortgage. In case of a change in the interest rate the lender will inform the client about the changes at the earliest opportunity by letter/other personal notice or notices/leaflets in branches and press advertisements. Section 6 then deals with the information inherent to charges. Similar principles are then provided by sections 11 to 16, which deal with the information to be provided by mortgage intermediaries to their clients.

<sup>1500</sup> The main statutory provisions affecting advertising are contained in the list of instruments available at: [www.asa.org.uk](http://www.asa.org.uk).

<sup>1501</sup> The self-regulatory system can be described as follows. A preliminary distinction has to be drawn between the control of broadcasting advertisements and the control of non-broadcasting ones. Advertising in the broadcasting media is subject to codes of practice formulated and enforced by the Independent Television Commission (website: [www.itc.org.uk](http://www.itc.org.uk). see “The ITC Advertising Standards Code – September 2002) and the Radio Authority. Government policy in respect of this sector rests with the Department of Culture, Media and Sport. The control of non-broadcasting advertising is regulated both by mean of statutory legislation and self-regulation rules. These are laid down in the British Codes of Advertising and Sales Promotion, which is drawn up by the advertising industry and supervised by a supervisory authority, namely the Advertising Standards Authority (ASA). The first edition of the *Advertising code* was published in 1961. The *Sales Promotion Code* was added in 1974. The two codes were brought together in 1995 in the *British Codes of Advertising and Sales Promotion* (last version of March 3<sup>rd</sup>, 2003). The Codes establish a set of principles which have to be respected (paragraphs 2.1-2.8: 2.1 All advertisements should be legal, decent, honest and truthful; 2.2 All advertisements should be prepared with a sense of responsibility to consumers and to society; 2.3 All advertisements should respect the principles of fair competition generally accepted in business; 2.4 No advertisement should bring advertising into disrepute; 2.5 Advertisements must conform with the Codes. Primary responsibility for observing the Codes falls on advertisers. Others involved in preparing and publishing advertisements such as agencies, publishers and other service suppliers also accept an obligation to abide by the Codes; 2.6 Any unreasonable delay in responding to the ASA’s enquiries may be considered a breach of the Codes; 2.7 The ASA and CAP will on request treat in confidence any genuinely private or secret material supplied unless the Courts or officials acting within their statutory powers compel its disclosure; 2.8 The Codes are applied in the spirit as well as in the letter. A description of the self-regulatory system is provided in the *British Codes of Advertising and Sales Promotion* (paragraphs 68.1-68.41). A second distinction can be established in relation to the field for which every authority is responsible. In particular: 1) all advertisements and promotion in non-broadcast media are covered by the British Codes of Advertising and Sales Promotion and are regulated by the ASA; 2) Advertisements on commercial terrestrial TV, and cable and satellite services, are regulated by the Independent Television Commission, while

are the Control of Misleading Advertisement Regulations 1998 (S.I. 1988/915), implementing EC Directive 84/450/EEC, and the Control of Misleading Advertisement (Amendment) Regulations 2000 (S.I. 2000/914), which implements the EC Directive 97/55/EC on misleading and comparative advertisements. According to Regulation 2 of the Control of Misleading Advertisements Regulations 1988, an advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote.

(c) German system

(i) Information between the parties

437. **The origins and nature of culpa in contrahendo** In Germany, *culpa in contrahendo* occurs every time that the conclusion of a contract which was properly expected by a party, does not happen on account of the improper conduct of the other. The fundamental question which this type of liability imposes is whether it may be ascribed to the rules of contractual liability or those governing extra-contractual liability. It is really in relation to this aspect that the clearest contrast has appeared between the German system and that of other European countries. The solution adopted previously by German case law and then implemented in the current code by § 311 of the BGB goes in the direction of assimilating *culpa in contrahendo* to contractual liability, upon the basis of the argument that when a person begins a negotiation with another person aimed at the conclusion of a contract, there arises a “special obligation relationship”. This relationship presents greater analogies with the rules of contract than those of tort.<sup>1502</sup> Some have perceived the reason for this choice distinguishing the German system in the fact that the German system for contract formation is very different from that of other European countries.<sup>1503</sup> Another ground for the expansion of contractual liability, as compared with extra-contractual liability in the sector being examined, could be found in the fact that in the German system, in contrast with the Italian system, there is a principle of typicality of extra-contractual tort. Indeed, though the German system for extra-contractual liability is able to cover many different circumstances, it does not

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advertisement on radio are regulated by the Radio Authority (Both regulators produced advertising codes. Broadcast advertising is also controlled by consumer protection law); 3) The Independent Committee for the Supervision of Telephone Information Services (ICSTIS) regulates the operation of premium number telephone lines, including how they are advertised; 4) The regulator responsible for financial promotion is the Financial Services Authority (FSA) under the relevant provisions of the *Financial Services and Markets Act 2000*; 5) Finally the DTI is responsible for ensuring that the law on misleading advertising and trade description is up to date and that there are effective means in place to ensure that consumers are not misled by advertisements.

<sup>1502</sup> Cf. Hom, JuS 1995, 377-387; Lorenz ZEuP 1994 218-243; von Bar, JuS 1982 637-645.

<sup>1503</sup> Gomard, Almindelg kontraktret 98-99.

contain a general clause similar to that provided by Art. 2043 of the Italian Civil Code.<sup>1504</sup>

**438. Examples of pre-contractual liability** So far as concerns the cases in which *culpa in contrahendo* may be identified, these can substantially be divided into three cases.<sup>1505</sup> First of all there is the classical notion of pre-contractual liability which occurs in the case of an unjustified rupture of negotiations. Secondly, this liability may also be invoked where, prior to signature of the contract, property is damaged or rights of the future contracting party infringed, for which the counter party has a duty of protection. Thirdly, *culpa in contrahendo* is applicable where false information is supplied either by the person intended to become party to the contract or by a third party.

**439. False information supplied by a third party** With respect to the last hypothesis, of liability for false information supplied by a third party, one should note that in the German system, as in others in Europe, three requisites are needed to be able to claim such liability: (i) the erroneous information must come from a qualified third party and the recipient must have placed reliance on its correctness, precisely because in the presence of a qualified person; (ii) the information provider must have realised, or ought to have realised, that the recipient was taking an important decision based on this information; and, (iii) there must be direct contact between the parties, even though the information provider may not have been contractually bound to supply the information. This type of liability may be claimed against banks which supply false information on the solvency of a person with whom the recipient wishes to do business.<sup>1506</sup> A further case occurs where a qualified person, such as a lawyer, by supplying false information, induces someone to enter a contract with a third party with the consequence of an advantage accruing to that qualified person.<sup>1507</sup> These cases have the characteristic that the contract was made consequent upon false information given by an expert who, though without any specific appointment, has a qualifying link with the recipient of the information.

**440. Duty of care** In the German system, pre-contractual liability may exist for a supplier of information, even in the absence of a fiduciary relationship between the expert and the recipient of the information, as where the latter, without necessarily concluding a contract, has requested information from an expert. In the opinion of the

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<sup>1504</sup> The BGB rules which govern extra-contractual liability are § 823, (1) and (2) para., as well as § 826 which states: § 823, (1) para.: "Any person who with malicious intent or with fault unlawfully injures the life, body, health, freedom, property or any other right of another is bound to compensate the damage." § 823, (2) para. establishes that a person who violates a law which is intended to protect another person (*Schutzgesetz*) responds for the loss thus caused. § 826 states: "Any person who intentionally causes damage to others, in violation of public order, is bound to compensate the other for the damage."

<sup>1505</sup> In this meaning cf. *Reischl*, *Arbeitsblätter zum Begleitkolloquium und Fallrepetitorium BGB*, Arbeitsblatt n. 9, obtainable on the internet site <http://www.jura.uni-passau.de/ifl/ab/ab9.htm>.

<sup>1506</sup> BGH 12th February 1979, in NJW 1979, p. 1595; BGH 28 January 1985, in WM 1985, 381.

<sup>1507</sup> BGH 4th March 1987, BGHZ 100 p. 117.

German judges, this “contact” is sufficient to found pre-contractual liability of a qualified person.<sup>1508</sup> In Germany (and some other countries such as Austria and Greece), perhaps on account of its derivation from the world of contract, *culpa in contrahendo* has been applied in circumstances where in many other European countries there would be extra-contractual tort, since they involve the injury of personal or property rights. The case from which this tendency to apply contractual principles arises is that of the “linoleum” of 1911. This was a case<sup>1509</sup> in which the *Reichsgericht* extended the rules of contractual liability to facts which lend themselves more to tort. A lady went into a department store and, after various purchases, addressed to an employee her desire to purchase some linoleum flooring. After examining various patterns, she made her choice. In an effort to extract the particular roll, the shop assistant allowed two other rolls to fall from the rack, knocking and injuring the client and her son. The *Reichsgericht* applied contractual principles to the facts, reasoning that the plaintiff went into the shop with the intention of purchasing the linoleum. Thus a relationship between the parties had been created which gave rise to duties on the part of the seller for the safeguard and protection of the seller. Breach of this duty justifies an award of damages in contract. The problem posed is therefore to establish up to what point principles of contractual liability may be extended into the factual domain of tort. In the light of the reasoning of the German judges, contractual liability should cover torts inflicted upon those who go into a store and find themselves in a queue for the cash till,<sup>1510</sup> but slip on yoghurt spilt on the floor.<sup>1511</sup> The protection would not assist a thief, since he has no intent to make a contract of purchase. Following the “linoleum” case, the duty of care has been extended to third parties who have a particular link with the person who is preparing to make a contract of purchase. In the case of yoghurt<sup>1512</sup> spilt on the supermarket floor, the operator is liable to respond also for damages to the potential purchaser’s daughter who went with her to do the shopping. The judges considered that contractual good faith imposed a duty to safeguard the child.

**441. Culpa in contrahendo after reform of the law of obligations** As regards the German rules for pre-contractual liability currently in force, it should be stated that on the 1<sup>st</sup> January 2002 the reform of the *Schuldrecht*, that is the law of obligations, entered into force. This reform also related to this type of liability. The tendency to extend the field of application of contractual liability to the phase preceding conclusion of the contract appeared also in this reform, which groups together the duties which fall upon contractual parties together with those which arise in the phase of negotiation. The German legislator through the combined provisions of § 241 (2) and 311 of the BGB has in fact expressly codified the duties of protection which fall upon the parties and upon third parties during the negotiations, assimilating them to the duties which are borne out

<sup>1508</sup> RG 27th October 1902, in RGZ 52 p. 365, 366, 367.

<sup>1509</sup> RG 7th December 1911, in JW, 1912, p. 191.

<sup>1510</sup> Cf. *Markesinis and Unberath*, Liability for others, Labour Law, and Stricter Forms of Liability, in *The German Law of Torts*, 2002, 704.

<sup>1511</sup> This is what was declared by way of *obiter dictum* in BGH 28th January 1976, in NJW, 1976, 712.

<sup>1512</sup> BGH 28th January 1976, cit.

of contract (*Rechtsgeschäftsähnliche Schuldverhältnisse*). § 241 (2) BGB, concerning the performance of obligations, provides in fact that the obligation debtor, besides the principal obligation, should further be responsible for all those duties, including that of information, which, taking account of the purpose and nature of the contract, are necessary to protect the rights of the obligation creditor. § 3 II BGB (2), relating to the rules for obligations arising out of contract, provides at 311 (2) that a relationship of an obligation aimed at the duties of protection arises also between two persons who commence a negotiation. Moreover, § 311 (3) imposes the same duties of protection also upon a third party who, though not intended to become part of the contract, induces the parties to conclude it, playing upon the trust which is reposed in him.

(ii) Information and liability of the producer or retailer: protection of the consumer

**442. The duty to inform in consumer contracts** First of all one must stress how the reform of the law relating to obligations in Germany was decisive in codifying rules which had already been affirmed judicially. An analogous impetus came from Community legislation, where the German legislator had provided the requirement for particular duties of information for different types of contract generally made between a professional and a consumer. One must note that with the reform of the law of obligations, the German legislator had the intention of inserting certain regulations contained in special laws already enacted in Germany as a result of the implementation of relevant Community directives into the BGB. The need to implement the Community directive on guarantees of the sale of consumer goods (Dir. 1999/44) represented the right opportunity to approve a text which had been on hold for years, since it called for radical modification of the law on the sale of goods. The main body of the BGB includes the regulation of contracts negotiated outside commercial premises (§ 312 BGB), long-distance contracts (§ 312 b) and c) BGB), including those concluded using electronic commerce for which there are particular dispositions in the light of Directive 2000/31 (§ 312 c) BGB), on timeshare property (§§ 481-487 BGB), and finally, consumer credit (§§ 491-507 BGB). One must further note that the laws here discussed protect the consumer by imposing specific duties of information and transparency on the professional as an essential condition for efficacy of the contract.

**443. Distance contracts** As far as long-distance contracts are concerned, § 312 c) of the BGB states that the professional must clearly and comprehensibly inform the consumer of everything stated in art. 240 EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – Introductory Dispositions to BGB*)<sup>1513</sup> concerning his identity, the general conditions of contract, the characteristics of the service offered, and the conditions and modalities to exercise the right to rescind available for the consumer, or to enforce the guarantee. For telephone conversations, the professional must immediately state his identity and state the purpose of the contract to the consumer. Exceptionally, under the provision of § 355

<sup>1513</sup> This concerns information which must be identified in detail by the Ministry of Justice, in consultation with that for the Economy and Technology, even without the consent of Parliament, taking account of the Directive 97/7 of the European Parliament and Council of 20th May 1997, on distance selling contracts.

(2) BGB, the term for the exercise of the consumer's right to rescind does not begin to run from the moment he is informed of this particular, but only when he receives the information stated in § 312 c) BGB.

**444. Contracts concluded electronically** As regards contracts concluded electronically (which are effectively a particular type of distance contract), the professional must provide the consumer with clear and comprehensible information listed in art. 241 EGBGB,<sup>1514</sup> concerning in particular the possibility to correct any errors committed, the transmission of the contract text, the options regarding the language before the sending of the order, and it must also give him the possibility to "save" the text of the general conditions of contract on his own computer's memory drive. This is without prejudice to the duty of the professional in any case to observe the duties to inform, specified in the legislation on distance contracts.

**445. Timeshare contracts** As for the regulation of timeshare, § 482 (1), (2) BGB states that the professional must give the buyer a brochure containing a description of the real property and also according to art. 242 EGBGB<sup>1515</sup> it must contain all the information necessary so as to allow the buyer to understand fully the content of the property right he is endeavouring to buy and his legal position, so that he may participate in the administration of the building in which the property is situated. Ss. (3) of the paragraph states that every advertising communication concerning sale packages for timeshare must clearly explain where the brochures are available. § 383 BGB also establishes that the brochure must be composed in the official language of the place where the buyer is domiciled; where there is more than one official language, the language chosen must be that of the member state chosen by the buyer. When these duties of information and openness are breached the buyer has a greater right to rescind the contract than in the normal situation. In fact, the term for exercise of this right only begins at the moment the information is given to the buyer by the professional, and in cases where the information is given in the wrong language, the term for the buyer's right to rescind is extended to one month (§§ 484, 485 (1)-(4) BGB). A further guarantee of transparency is given by the provision in § 484 BGB, which establishes an obligation for these contracts to be expressed in writing and prohibits concluding such contracts through electronic commerce. The body of the contract must contain all the elements mentioned in the brochure and if these have been modified, the modifications must be brought to the buyer's attention before signature.

**446. Consumer credit contracts** As for consumer credit contracts, transparency is assured by the fact that there must be expressly stated in the contract details of every aspect of

<sup>1514</sup> Art. 241 of the Introductory Provisions of the BGB provides that this information must be identified in detail by the Ministry of Justice, in consultation with that for the Economy and Technology, even without the consent of Parliament, taking account of the Directive on electronic commerce 2000/31.

<sup>1515</sup> Also art. 242 EGBGB provides that the content of this information must be identified in detail by the Ministry of Justice, in consultation with that for the Economy and Technology, even without the consent of Parliament, taking account of the obligations of Community law.

the relationship: the net amount of the mortgage amount and the maximum loan, the total amount of the costs of the mortgage, the particulars of the repayment of the capital, the applicable interest rate and the total amount of annual interest, plus any factors which may change any of these features, the requested guarantees and any potential collateral contracts (for example bank guarantee or insurance), which are stipulated as a requirement for the loan. Failure to observe the requirement for writing, under § 494 BGB has the consequence that the contract is declared null. This is excluded where the loan is nevertheless still delivered. Also the lack of written details makes any clause ineffective. In fact, § 494 BGB states that the omission of the effective or initial interest rate, in cases where the parties had agreed on a variable rate, or of the total amount of costs and interests, results in the automatic application of the standard interest rate fixed by law. Costs that are not indicated are not owed by the consumer and the resulting total of the payments must be re-calculated using the new figures. Failure to foresee factors which would effect changes in the contract precludes those changes from being made; in addition the professional is not allowed to request further guarantees other than those stated in the contract. This last provision is not valid in cases where the net amount of the loan is more than € 50,000. Also, the mortgage institution must observe the quoted interest rate even if it is inferior to that which was intended to be applied.

**447. Standard contract terms** Duties of information and transparency are also necessary in regulating the general terms and conditions of the contract. One must note that that this was stated in a special law, the AGBG, which was inserted in the body of the BGB §§ 305-310 after it had been modified in 1996 in implementation of Community Directive 93/13 on onerous clauses. The reform of the *Schuldrecht* brought certain changes to the regulation of the general conditions of contract under the heading of transparency, establishing that an unfair disadvantage can result from the formation of a clause if it is unclear or incomprehensible (§ 307 (1) BGB). In such a case, transparency becomes a valid test for contractual equilibrium. One must also note that prior to the reform, only those clauses that the consumer could possibly know of were considered to be part of the contract and therefore effective. When the *Schuldrecht* came into force, the German legislator expressly provided that when explaining the contract content and clauses to the consumer, the service provider must consider any physical or mental disabilities of the consumer which might further complicate his ability to understand the contract (§ 304 (2) BGB). In this case too, failure to observe the prescribed rules may render individual clauses or the whole contract ineffective.

## VI. Terminological Differences between Contract and Tort Law

**448. Terminological differences within the same legal system** The question posed to the authors of this study – namely, whether there are differences in terminology or concepts between property law and contract law, and between non-contractual liability law and contract law which could result in “competition imbalances, or real or likely obstacles to the smooth running of the internal market”<sup>1516</sup> – can be read in various ways. It could (i)

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<sup>1516</sup> Para. 1 above.

be a question of whether within one and the same legal system there are differences of the type named. Examples for this actually exist, but as such they are unimportant for the proper functioning of the internal market. One could think of, for example the different uses of the terms “*Geschäftsbesorgung*” and “*Auftrag*” within the German BGB depending on whether they are used in the context of contract law or the law of *negotiorum gestio*, also of the different applications of the word “*Leistung*” in German contract and German unjustified enrichment law, or of the different meanings of the term “*Eigentum*” in the German constitution and in the German BGB.

**449. Translation problems** With the question posed by the Commission, however, (ii) a translation problem in the relations between the member states grounded in the different legal concepts could have been aimed at. So, for example, the French concept of *faute* is neither identical to the German term of *Verschulden* (which itself can take on a slightly different meaning between Austria and Germany, i.e. within one and the same language), nor can *faute* be translated as *fault* without a loss of meaning, totally disregarding the fact that the latter term is almost never applied in the English legal language.<sup>1517</sup> Also, for example, *dommage*, *damage*, *Schaden* and *danno* (*ingiusto*) are by no way the same,<sup>1518</sup> and the same is true for simple terms like “thing”, *bien* or *Sache*.<sup>1519</sup> From the experiences of the Study Group on a European Civil Code, we can report that, for example, a differentiation between “reparation” (as an overarching term for monetary compensation and compensation through returning things to their original state “*in natura*”) and “compensation” (monetary compensation) is scarcely or not at all applied in Swedish case law. This is because the Swedish Liability Act only deals with monetary compensation and for this uses the term “*skadestånd*”. A further example is provided by the term “product liability” [Swedish: *produktansvar*]. This is because under “*produktansvar*” in Scandinavia, liability for consequential damage caused by faulty or defective products is understood. Here belongs not only the liability of the producer, the quasi-producer and the importer, but also generally the liability of the seller for consequential damage as a result of a defect. The Scandinavian term and the German term of “*Produkthaftung*” are therefore not congruent, because the latter regularly does not mean simple seller’s liability.<sup>1520</sup> The list of such examples could easily become longer.

**450. Misunderstandings** A third variant of the same question could concern the fact that particular expressions which parties use in contracts which they write down in the mother tongue of only one party, or even in a “neutral” language, can have, in this language and in the congruent legal system, another meaning to that which was known to the parties. Someone, for example, who uses the word *damages* in an English language contract, will scarcely know that this does not refer to the legal consequence of “compensation” from breaches of fiduciary duties. This is because the correct technical

<sup>1517</sup> The only exception known to us is sec. 1(1) Contributory Negligence Act 1945.

<sup>1518</sup> In-depth *von Bar*, *The Common European Law of Torts*, vol. II, paras. 4-45.

<sup>1519</sup> The term of “*Sache*” e.g. under Austrian law includes services, see Rummel (*-Rummel*), ABGB I<sup>3</sup> § 864 no. 9.

<sup>1520</sup> *Bloth*, *Produkthaftung in Schweden, Norwegen und Dänemark* (1993) 27 f; *Helmer and Johansson*, *Skadeståndsrätt*<sup>6</sup> (2000) 311 f.

expression for this is “equitable compensation”. Difficult questions of interpretation are the consequence of this. Comparable misunderstandings are to be feared, for example, if “*damage to property*” is written down in an English language contract between a Greek and a Portuguese trader. Both would very probably interpret this term in the sense of their own legal systems, i.e. in the sense of a breach of property law and not in the sense of Common Law as damage to an object. If a person does not know the associated implication of a specific legal term in the target language, there is always the danger of saying something completely different to that which one intends, even if in the translation, from a pure linguistic point of view, there may be nothing to find fault with.<sup>1521</sup>

451. “**Non-contractual liability**” An example is also provided by the instructions for this study. The term “non-contractual liability” is used; what is meant is clearly only tort law, not the whole of non-contractual liability law (although at the same time one could ask what exactly could be meant by “*liability*” in a national as well as a European context, and indeed independent from whether the term is applied in contract or tort law). The observations on “Rome II”<sup>1522</sup> show the terminological problems very clearly. *Art. 1* rewritten with *material scope* now reads in its current form as follows: “(1) This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. [...]. (2) The following are excluded from the scope of this Regulation: (a) non-contractual obligations arising out of family relationships and relationships deemed to be equivalent, including maintenance obligations; (b) non-contractual obligations arising out of matrimonial property regimes and successions; (c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character; (d) the personal legal liability of officers and members as such for the debts of a company or firm [...]; (e) non-contractual obligations among the settlers, trustees and beneficiaries of a trust; (f) non-contractual obligations arising out of nuclear damage”. One therefore sees that even an apparently simple expression like “non-contractual liability” can lead to numerous misunderstandings and lacks of clarity.

452. **Law of obligations** One can not even assume that terms such as “*Schuldrecht*” or “law of obligations” are understood everywhere in the same sense. In this context it has to be remembered that in French law a contract of sale transfers title, which is not the case in German law, or more generally: that the German BGB has developed a book of “*Schuldrecht*”, but the *Code Napoléon* has not. It is further to be observed that individual

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<sup>1521</sup> Even in literature of the field such problems are found again and again. For example, Vito Roberto and Corinne Widmer, Tort Liability for Services, in: Rapports suisses présentés au XVIème Congrès international de droit comparé I (2002) 203-227 translate the category of “*Vertrauenshaftung*” (“liability for reliance”), known in German, Austrian and Swiss law, which exists there as the overarching term for *culpa in contrahendo*, contract with protective effect for third parties and comparable legal concepts, without exception with “breach of confidence”. Breach of confidence is, however, a tort in Common Law.

<sup>1522</sup> See above at para 16.

jurisdictions (like the Common Law) in principle make do without *rei vindicatio* and reproduce its equivalent in tort law (conversion), or that *rei vindicatio* is known, but (as in Scotland) is interpreted as an *actio in personam* based on a “real right”.

**453. Drafting European legislative texts** The formulation of the question by the Commission may admittedly at its crux go beyond the issue of how further steps of legal approximation can succeed in being taken as planned, free from internal contradictions, in spite of the variety of European languages and the different technical meanings which arise from a number of parallel legal terms in a respective legal language. The experiences up until now on the level of Community law as well as in academic working groups, in particular the Commission on European Contract Law and the Study Group on a European Civil Code, provide a lot of illustrative material on this serious problem. It can only be overcome by a Common Frame of Reference, which from the beginning pays attention to terminological consistency and uses a language which is not based too narrowly on existing national terminology.

**454. European Community law** Whenever law of liability questions are the object of a regulation of the European Community, they have to use virtually out of necessity basic terms such as “*damage*”, “*fault*”, “*mistake*”, “*causation*” or “*reasons for defence*”, in respect of contractual liability as well as tortious liability. In the legal systems of the member states these terms, however, are pre-moulded through the respective national legal tradition, which in turn limits the comprehensibility of European legal texts, provokes reactions of rejection, impairs the success of the legal alignment strived for and can even have as a consequence, important legal alignment projects meeting with so much protest that they have to be withdrawn.

**455. Damage and Schaden** Many Directive texts in European Community law use for example terms such as “*damage*”, “*dommage*”, “*danno*” or “*Schaden*”. One of the difficulties connected therewith is the fact that with the translation of one of these terms into the different languages of the European Union, a shift of meaning can arise. The German term “*Schaden*”, for example, describes the occurred economic (and should the situation arise, non-economic) *loss* on the part of the affected party, as a consequence of the breach of an obligation or right, not the breach or disturbing of the right in itself. The “*Schaden*” in German law is an element of the consequences of liability, not of grounds for liability. In Italian law the term “*danno*”, on the other hand, has a double meaning; it concerns the breach as well as the disadvantages or losses resulting from it, and in France the situation is likewise. Common Law, on the other hand, has never found it necessary to define the term “*damage*” once and for all; it can therefore have a different meaning from tort to tort.<sup>1523</sup> Solely placed in front of this background may it become understandable why the already referred to proposal of a Directive for the liability for defective services<sup>1524</sup> would have posed almost unsolvable problems for the legal systems of the member states. In art. 4 lit. ‘*damage*’ was defined as ‘*death or any other direct damage to the health or physical integrity of persons*’. Art. 4 lit. c went however on to say that such ‘*financial material*

<sup>1523</sup> Further *von Bar*, *The Common European Law of Torts*, vol. II, paras. 5-22.

<sup>1524</sup> OJ 1991 C 12/8.

damage' is recoverable which is 'resulting directly from the damage referred to at (a).'" Terminological lack of clarity of this type is a warning example; large legislative plans can founder on this (like the services Directive). The regulation proposal "Rome II" suffers from exactly the same problem, because in this also, the central term of "damage" remains unclear.

**456. Damages** Equally as important – there has certainly been a lack in European Community law up until now of coherent general regulation of remedies – are the legal consequences side of a compensation claim (or the amount of "damages" owed in the sense of English law). Up until now it has only been expressly decided that for the law of liability for gender-specific unequal treatment the claim for compensation also includes a claim for interest.<sup>1525</sup> The compensability of lost profit has merely been voiced in respect of the liability of states for the late implementation of directives.<sup>1526</sup> What is unclear in many cases is whether the term damage also includes non-material damage. Under the Product Liability Directive this is known not to be the case; the liability under art. 5 of the Package Travel Directive includes non-economic loss, on the other hand, according to the already outlined case law of the ECJ, and the same is true for liability under the European anti-discrimination legislation.<sup>1527</sup> This case law has to provoke the question of whether today there is already a general term of damages in Community law, at least in the sense that if the respective legal text does not state otherwise, it includes compensation for non-economic loss. The question is to be answered in the negative; every Directive or Regulation appears until now to apply its own term for damage(s).<sup>1528</sup>

We consider it probable that this impacts on the actual practice of drafting and concluding contracts. Given the lack of a unified legal terminology in Europe, contractual agreements need to clarify by way of detailed drafting, for instance, what the position is with respect to particular items of loss referred to in connexion with compensation for loss in the case of defective performance or a failure to perform.

The problem of how to handle contractual agreements drawn up in a foreign language received the greatest attention in the responses to our questionnaire. Across all branches of business the uniform reply was this issue involves large problems and costs. That applies also to contracts between businesses in different countries sharing the same language (e. g. Austria and Germany), but it applies in particular to contracts in a foreign language. (The preferred language for international transactions is English.) The main difficulty identified is the correct translation of legal terms of art. That can often only be achieved when one has a

<sup>1525</sup> ECJ 2nd August 1993, *Helena Marshall v Southampton and South West Hampshire Area Health Authority*, ECR 1993, I-4367, para 31.

<sup>1526</sup> ECJ 5th March 1996, ECR 1996, I-1029, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd*, para. 87; ECJ 10th July 1997, ECR 1997, I-4025, para. 26 – *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)*.

<sup>1527</sup> See above at paras 131 ff.

<sup>1528</sup> *Cornides*, Immaterieller Schaden im Gemeinschaftsrecht, ÖJZ 2003, 821-825.

sufficient knowledge of the complete legal system in which they are to be found. For the avoidance of misunderstandings, for example, the forms of damage which are compensatable may be specified extensively. The attempt is made to formulate as exactly as possible (e. g. instead of “consequential damage” to refer to “loss of profit”, “loss of production”, etc). “Substantial” or “extra” costs in legal advice and translation are invariably associated with the use of a foreign language for the contract. On this point there was general unanimity among those responding to the questionnaires. It was also pointed out that the laws of some countries (e. g. Poland) contain statutory provisions which make the use of a national language obligatory for the validity of a contract.

**457. Fault** The failed Services Directive provides a second warning example, namely its remarkably unclear use of the term “fault” (“*Verschulden*”). Art. 1 (translation by *Blackie*) reads as follows: “(1) The service provider is liable for damage caused to health or bodily integrity and also for damage to movable and immovable property including property which is part of the service provided. (2) The burden of proving the absence of fault shall fall upon the supplier of the service.” The Product Liability Directive, on the other hand, says in its second introductory statement that the problem it addresses can only be adequately solved by the imposition of “liability without fault on the part of the producer.” One should therefore assume that liability under the Product Liability Directive is tougher than that which would have existed under the Services Directive. Exactly the opposite is true, however. This is because under the Product Liability Directive the consumer has to prove the “defect” of a product (art. 4). The proposed Services Directive, on the other hand, would have even led to a reversal of the burden of proof in respect of the defectiveness of the service if it contained the wording that “in assessing the fault, account shall be taken of the behaviour of the supplier of the service, who, in normal and reasonably foreseeable conditions, shall ensure the safety which may reasonably be expected”, art. 1 (3). The random use of the terms ‘defect’ (to denote unlawful act) and ‘fault’ produced (or would have produced) entirely contradictory results!

## VII. Private International Law

**458. Introduction** It is not the job of this study to individually describe the international private and private procedural law of the contractual and non-contractual obligation relationships within the European Union. From the point of view of the interference problem it appears necessary, however, to draw attention once again to the following points which exemplify the close connection between contract law and non-contractual liability law, but this time from a different angle.

### (1) The Ancillary Relationship of Tort Law to Contract Law

**459. Priority over *lex loci delicti commissi*** The first point concerns the so-called “accessorial relationship to contract” of tortious claims. The international tort law of the member states, in contrast to the larger part of their international contract law, has until

now not been harmonised. International tort law, however, now as before is controlled by the connection to the scene of the event (the place where the tort was committed),<sup>1529</sup> but at the same time there are numerous exceptions to this basic proposition in many states. The most important from the point of view of this study, is the connection to the law of a state with which there exists a considerably narrower connection compared to the law of the state in which the scene of the event is found.

In so far as we received replies to the questions on private international law in the second of our questionnaires, these did not respond to the problem of interaction set out in more detail below. Replies from England, however, pointed out that the press and other media businesses in that jurisdiction have major concerns regarding the dependence of international tort law on the place where the tort is committed. This threatens to restrict the freedom of the press under English law. According to this view a harmonisation of the law of tort for publications in the media could only be contemplated (if at all) on the basis of the law of the country from which the medium (in particular the press publication) originates. Responses from the insurance industry indicated that a harmonisation of the conflicts of extra-contractual legal obligations would at least dispense with the difficulties of ascertaining which law is applicable.

**460. Germany** Following art. 41 (2) no. 1 of the German EGBGB, a considerably narrower connection can arise in particular from a legal or actual relationship between the parties involved. This connecting factor pursues the purpose of subjecting a given dispute as much as possible to one individual legal system, and not to split it into different legal relations which are respectively subject to different legal systems. The most important example in turn, is provided by the concurrence of tortious claims with contractual claims. Subjecting tortious claims to the regime of the corresponding contract claim comes into consideration in particular in the case of damage arising out of the breach of transport contracts, with the responsibility for products of sellers (application of the law governing the sales contract) as well as with accidents at work (application of the law governing the employment contract).

**461. Austria** In Austrian law, also, (§ 48 (1) sentence 2 IPRG) does not apply the *lex loci delicti commissi*, if the parties have a stronger connection to another law. The most important example is also here provided by situations in which extra-contractual claims concur with contractual ones.<sup>1530</sup> If for example, a doctor practising in Austria causes

<sup>1529</sup> Austria: § 48 (1) IPR-Gesetz; Germany: Art. 40 EGBGB; France: Art. 3 CC as interpreted by courts and literature, see e.g. Cass.civ. 1st June 1976: D. 1977.257, note *Monéger*; Cass.civ. 16th April 1985: Bull. civ. I no 11; von Bar/*Gotthardt*, *Deliktsrecht in Europa*, Landesberichte Frankreich und Griechenland (1993) 12; *Loussouarn/Bourel*, *Droit international privé*<sup>3</sup> (1988) Nr. 179; *Mayer*, *Droit international privé*<sup>5</sup> (1994), Nr. 671; Greece: Art. 26 CC; Italy: Art. 62 CC; Spain: Art. 10 (9) CC; United Kingdom: sec. 11(1) Private International Law (Miscellaneous Provisions) Act 1995.

<sup>1530</sup> OGH 29th October 1997, IPRE 2/87 = IPRax 1988, 363, 364; OGH 10th July 1986, IPRax 1988, 33; OGH 30th June 1988, ZfRV 1990, 229 = IPRax 1989, 394; *Schwind*, IPRax 1989, 401;

damage to a German citizen through a professional error during medical treatment in Italy, then the tortious compensation claims of the patient are to be judged in accordance with Austrian substantive law, because this is also to be applied to the medical treatment contract.

**462. France** The French case law until now has kept strictly to the *lex loci* rule. This is because attempts in exceptional cases to apply the law of the common nationality or common domicile of the tortfeasor and injured party, have always been rejected by the *Cour de Cassation*.<sup>1531</sup> Even when the tortfeasor and the injured party are both of French nationality and merely the place of the event has a connection to abroad, the *lex loci delicti* is applied.<sup>1532</sup> The *Cour de Cassation* has allowed an interesting exception from this rule, however, whereby it applied French law as the law governing contractual relations amongst French nationals one of whom had offered the other a gratuitous trip.<sup>1533</sup>

Differences between the private international law rules of the member states can give rise to particular information costs. For example, should there be an accident affecting a passenger during a tour through France with a German bus company, a German court would apply German law to all of the claims, whether contractual or non-contractual. By contrast, should such action be raised in France then under French private international law there is scope not only for the application of German contract law, but also for the application of French tort law. In consequence, the German bus tour company in an action raised in a French court would not be able to plead its defence solely with regard to the rules of German law, the system with which the bus tour company is familiar.

We received a great many replies to this point. Responses from the insurance sector emphasised that the divergent rules on conflicts of law are particularly cumbersome in the extreme and in practice result in businesses not being able to offer insurance protection for certain types of event. All other responses also uniformly stressed that the diversity of conflicts of law leads to substantial costs in obtaining information and entails extra expense. Only large businesses were prepared to incur these; others pledge their trust in the assumption that everything will turn out well.

**463. United Kingdom** Section 12 of the Private International Law Act allows for the displacement of the general *lex loci* rule if the law of another country is “substantially more appropriate”. Among the factors to be taken into account sec. 12 (2) mentions: a

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*Mänhardt and Posch*, Internationales Privatrecht, Privatrechtsvergleichung, Einheitsprivatrecht: eine Einführung in die internationalen Dimensionen des Privatrechts<sup>2</sup> (1999), § 3 Rn. 70 (p. 97); von Bar/*Schilcher/Kleewein*, Deliktsrecht in Europa, Landesbericht Österreich (1993) 24.

<sup>1531</sup> Cass.civ. 25th May 1948, Rev. crit. dr. int. pr. 1949.

<sup>1532</sup> *Légier*, Juris-Classeur, Droit international privé (Vol. 9; 1993), Fasc. 553-1 Rn. 31 (10); *Ferid/Sonnenberger*, Das Französische Zivilrecht, Bd. 1/1 (2. Auflage; Heidelberg 1994), 1 B 249 (S. 197); compare Civ. 25th May 1948, Rev. crit. dr. int. pr. 1949.

<sup>1533</sup> Trib. de grande instance de Dinan 24th September 1968, D. 1969 Jur. 404, note *Prévault*.

pre-existing (contractual) relationship between the parties.<sup>1534</sup> This rule might be traced back to a judgment of Lord Denning, who stated in *Sayer v International Drilling Co NV*<sup>1535</sup> that “it is obvious that we cannot apply two systems of law, one for the claim in tort, and the other for the defence in contract. We must apply one system of law by which to decide both claim and defence.”<sup>1536</sup>

## (2.) Problematic Issues of Characterisation

**464. General** The phenomenon of subjecting tort claims to the law governing the contractual relations between the parties is closely related to the often remarkably problematic question of the correct qualification of compensation claims in the border area between contract and tort law. This is because in terms of result there is scarcely a difference whether a certain basis for a claim is qualified as contractual from the outset, or whether it is indeed qualified as tortious, but in the circumstances of the case is subjected to the law governing the contract relationship. Moreover, the qualification problems between contract and tort law are numerous and unsettle all the conflict of laws legal systems of the European Union. One of many examples shows the open question following the international private law handling of contractual grounds for defence, countering tort law legal actions.

**465. Examples from the case law of the ECJ** It is not only all national conflict of law legal systems of the European Union which face difficulties of this type. They have in the meantime also precipitated into the case law of the European Court of Justice. Four examples are given here. The first concerns the qualification of *culpa in contrahendo*. The European Court of Justice in the framework of the interpretation of art. 5 no. 3 of the Brussels Convention, qualified claims from a bad-faith breaking-off of contractual negotiations as claims in tort or equivalent to tort.<sup>1537</sup> and with this decided upon the model of most of the Romance legal systems. Admittedly it was not conclusive, especially as arts. 2:301 and 2:302 PECL in this respect assume a qualification as contractual. The liability developed from French case law for *vices cachés* within contract chain, was in contrast to the French legal position, again labelled by the ECJ as part of tort law,<sup>1538</sup> which forms a narrower term for contract law from the ECJ. The third example confirms this. The legal action for compensation due to the improper breaking off of a commercial agent contract was qualified by the ECJ as contractual.<sup>1539</sup> Finally, the fourth example concerns misleading promises of winnings by companies to consumers. Such promises of winnings are dealt with by the European substantive laws in completely different systematic contexts. The French *Cour de Cassation* in dealing with this problem, revived the

<sup>1534</sup> *Cheshire and North*, Private International Law<sup>13</sup> (1999), ch. 19, p. 638.

<sup>1535</sup> [1971] 3 All ER 163, [1971] 1 W.L.R. 1176; see *Collins* (1972) 21 ICLQ 320.

<sup>1536</sup> [1971] 1 W.L.R. 1176 at 1181.

<sup>1537</sup> ECJ 17th September 2002, C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH*, EuZW 2002, 655.

<sup>1538</sup> ECJ 17th June 1992, Rs. C-26/91, *Handte v TMCS*, JZ 1995, 90, note Pfeifer.

<sup>1539</sup> ECJ 8th March 1988, Rs. 9/87, *Arcado*, ECR 1988 II, 1539 = NJW 1989, 1424.

ancient category of the quasi-contract and allowed the consumer a claim to performance resulting from this category.<sup>1540</sup> Austria put such a claim in § 5j of the Austrian Consumer Protection Law, and Germany provided for it with § 661a BGB in the middle of contract law. In connection with international private and private procedural law, the German BGH took the view that in all these cases the consumer's place of habitual residence is what is important, independent of whether or not a contractual relationship in the sense of arts. 13-14 Brussels Convention is to be assumed. This is because even if this was to be answered in the negative, the *lex loci delicti commissi* (art. 5 (3) Brussels Convention) would lead to the same result.<sup>1541</sup> The European Court of Justice, on the other hand, appears to want to differentiate between a (consumer) contract and a tort law qualification, depending upon the closeness such a promise of winnings has to a contractual relationship.<sup>1542</sup>

### (3.) Bad Faith Proceedings and Antisuit Injunctions

466. **Tort law versus contract law** So-called “bad faith proceedings” and the reactions to them, namely so-called “antisuit injunctions”, are increasingly growing into a problem of no small proportions for the bringing of cases within the European Union, which was also not satisfactorily solved by the Brussels Convention or the follow-up regulation of the EU. “Antisuit injunctions” are not even fully unproblematic from an international law point of view; within the European Union, however, doubtlessly a highly unwelcome phenomenon, which feeds on mistrust with respect to other legal systems and their administration of justice. What it involves is most easily explained by means of the following example from English case law.

*Continental Bank v. Aeakos SA*, a decision of the Court of Appeal from 1994,<sup>1543</sup> involved the following state of facts. In 1981, an American Bank, acting through its branch in Athens, granted a loan facility to a number of shipping companies managed in Greece. Three Greek individuals guaranteed the loan. The agreement contained a clause stating that it was governed by English law; there was also a clause giving jurisdiction to the English courts. The borrowers defaulted. In 1990, however, the borrowers brought proceedings in Greece based on art. 919 Greek CC (the *actio de dolo*), claiming damages on the allegation that the manner in which the bank had exercised its rights under the loan agreement was contrary to *bonos*

<sup>1540</sup> Cass.ch.mixte 6th September 2002, D. 2002, 2531.

<sup>1541</sup> BGH 28th November 2002, RIW 2003, 147 = NJW 2003, 426 with essay *Leible, Bingo! – Gewinnbestätigung jetzt auch aus Karlsruhe*, NJW 2003, 407-409.

<sup>1542</sup> ECJ 11th July 2002 – C-96/00 – *Gabriel* –, IPRax 2003, 50; see on this *Leible, Gewinnbestätigung aus Luxemburg. Zur internationalen Zuständigkeit bei Gewinnmitteilungen aus dem Ausland*, IPRax 2003, 28-34.

<sup>1543</sup> [1994] 1 W.L.R. 588; see on this *Hartley, How to abuse the Law and (maybe) come out on Top: Bad-Faith Proceedings under the Brussels Jurisdiction and Judgments Convention*, in: *Law and Justice in a Multistate World. Essays in Honor of Arthur T. von Mehren* (New York 2002), 73-81.

*mores*. The claimed sum amounted to twice what was owed under the loan agreement. The Greek proceedings were thus based on tort law. They nevertheless barred English proceedings under the *lis pendens* rule contained in art. 21 of the (then still in force) Brussels Convention. The American Bank therefore asked the English court for an antisuit injunction, i. e. an injunction directed against the Greek borrowers aiming at stopping the Greek proceedings. The English court interpreted the jurisdiction clause so as to cover all proceedings arising under the loan agreement, i. e. even if they were brought in tort. Furthermore, the Court of Appeal held that where the court seized second has exclusive jurisdiction by virtue of a jurisdiction agreement, it is not obliged to apply art. 21. Finally the court granted an injunction to stop the Greek proceedings. "Clearly it did not trust the Greek court to take the necessary action."<sup>1544</sup>

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<sup>1544</sup> *Hartley* loc.cit 76.



## Part Two: Property Law and Contract Law

### I. Scope of This Part

#### (I.) Law of Things or Property Law?

**467. Identifying the subject matter** The fields of national law to be covered in this study carry different names, and this divergency of terms is based upon diverging basic conceptions. Most countries start from the idea that the characteristic feature are the objects to which this part of the law applies; however, they even differ on the description of these objects, and sometimes the “same” term is used with differing meanings. At least one modern codification focuses on the nature of the rights to be covered rather than on the nature of the objects to be affected. It is therefore necessary to determine at the outset the general scope of this Part.

**468. Narrow concepts of “thing”: Germany and Greece** The third book of the German and the Greek civil codes is entitled “Law of Things” (*Sachenrecht*; *Empragmato Dikao*). In both countries the term “thing” is defined as covering only “corporeal assets”.<sup>1</sup> This definition excludes, in particular, rights.<sup>2</sup> Correspondingly, the “term “proprietary rights” (*dingliche Rechte*; *Empragmata dikaiomata*) is defined narrowly as rights which grant “power over a thing which is effective vis-à-vis anybody.”<sup>3</sup> Amazingly though, neither the German nor the Greek civil code are consistent: both deal in their books on the law of things with a pledge of rights,<sup>4</sup> especially receivables,<sup>5</sup> and with an usufruct in rights.<sup>6</sup> This inconsistency is characteristic and demonstrates the necessity of a broader approach.

**469. Broad concepts of “thing”: Portugal, Italy, Austria, France and Belgium, Spain, Sweden, Scotland, England and Wales** The Portuguese Civil Code of 1966 is the only modern code in Europe which explicitly gives a broad definition of the basic concept of “thing”;

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<sup>1</sup> German CC § 90; Greek CC art. 947 par. 1. Greek CC art. 947 par. 2 adds: “Natural forces or energies, especially electrical current and warmth, also constitute things so far as they are restricted to a specific space and can be controlled”.

<sup>2</sup> Germany: *Baur/Stürmer*, *Sachenrecht*<sup>17</sup> (1999) 11: “With this definition the law excludes all other assets from the scope of application of the law on things: receivables, industrial property rights ...”. Greece: *Eleftheriadou*, *Griechenland*, in: *v. Bar* (ed.), *Sachenrecht in Europa III* (1999) 7 ss. (26 s.).

<sup>3</sup> Greek CC art. 973; Germany: *Baur/Stürmer* loc.cit. 6.

<sup>4</sup> German CC § 1273-1291; Greek CC art. 1247-1256.

<sup>5</sup> German CC § 1279-1290; Greek CC art. 1248-1254.

<sup>6</sup> German CC § 1068-1084; Greek CC art. 1178-1182.

according to CC art. 202 (1): “Everything is called a thing (*coisa*) that may be the object of legal relationships”. – This broad definition has been inspired by Italian CC art. 810 according to which “[t]hings (*beni*) are those assets (*cose*) that can be the objects of rights”. Both terms are to be understood broadly as covering both corporeal and incorporeal objects, but only things become legally relevant; and these also cover rights.<sup>7</sup> This is confirmed by CC art. 813 which declares applicable to rights relating to immovable things the provisions on immovables and to all other rights the provisions on movables. – The same idea is already expressed in the Austrian Civil Code of 1811. The opening provision to book II on the law of things reads: “Everything that differs from the person and serves the use of human beings is a thing in the contemplation of law” (CC § 285). Correspondingly, § 292 distinguishes between corporal and incorporeal things, the latter category comprising rights; cf. also § 298 and § 299. – The French/Belgian civil codes of 1804 devote book II to important aspects of property law, especially the fundamental distinction between immovables and movables and to ownership. However, proprietary security rights are dealt with separately in the law of obligations because of their function of securing obligations, especially contractual obligations. The core notion of *bien* (asset) is not expressly defined. Its meaning can, however, be derived from the enumerations of immovable and movable assets: According to CC art. 526, the usufruct and servitudes as well as actions for return of immovables are immovable. And according to CC art. 529 obligations and actions for sums of money or movable assets, shares and participations in companies as well as (life) rents are movable assets. Clearly, therefore the French and Belgian concept of *bien* also comprises patrimonial rights.<sup>8</sup> A legislative confirmation can be found in the French Law on copyright of 1957 where copyright is designated as incorporeal property (*propriété incorporelle*). – The Spanish Civil Code of 1889 essentially follows the same conception as the French/Belgian civil codes. CC art. 334 in its enumeration of the things which are immovable mentions at the end (no. 10) public law concessions for public works, servitudes and the other proprietary rights in immovables. And art. 336 regards as movables, rents and pensions, unless they encumber an immovable as well as contracts for public services and mortgage certificates. However, the code uses two different core terms, *cosa* (literally, thing) and *bien* (literally, asset). While the code’s use does not seem to be quite consistent,<sup>9</sup> art. 346 par. 1 gives a general rule of interpretation in which *cosas* and *bienes* are regarded as equivalent. This is also the dominant opinion of writers and of the Supreme Court.<sup>10</sup> Thus, indirectly a broad scope of application for the law of things is achieved. – Sweden follows the same general approach. Since it has codified only the law on immovables, the relevant statute defines

<sup>7</sup> Trabucchi, A., *Istituzioni di Diritto Civile*<sup>33</sup> (1992) 367-368.

<sup>8</sup> Terré/Simler, *Droit civil. Les biens*<sup>4</sup> (1992) no. 12, 31-40; Malaurie/Aynès (-Théry), *Cours de droit civil. Les biens. La publicité foncière*<sup>4</sup> (1998) no. 6, 16.

<sup>9</sup> In CC art. 333 and 336 *cosa* seems to have a broader meaning than *bien*.

<sup>10</sup> Díez-Picazo, *Instituciones de derecho civil I* (1995) 267; Bercovitz, *Comentario al Código Civil* (2001) 469; Tribunal Supremo 4 Dec. 1890 (cf. Moreno Gil, *Código Civil y jurisprudencia concordada*<sup>8</sup> 1996) 359: «La acepción genérica de la palabra bienes comprende todas las cosas de que los hombres se sirven o ayudan: muebles y raíces, corporales y incorpóreas, fungibles y no fungibles». *Contra*: Manresa y Navarro, *Comentarios al Código civil español VI*<sup>18</sup> (1973-1976) 11.

all assets that are immovable. All other assets are movable; these comprise not only corporeal things but also receivables and intellectual property rights as well as lease contracts, pledges and even mortgages and usufruct in immovables.<sup>11</sup> – In Scotland, property law is defined as “the law of things (res)”.<sup>12</sup> Things are either corporeal or incorporeal and are then further divided into those relating to land (so-called “heritable property”) and those that are movable. Both these categories comprise also rights: “heritable property”, i.e. land, covers rights such as the lease and servitudes;<sup>13</sup> and “incorporeal moveable rights” comprises other rights, such as receivables and intellectual property rights.<sup>14</sup> – In spite of its different historical roots and general structure, English law uses the same basic classification. It distinguishes between real property, i.e. land, and personal property. Originally only the holder of land was entitled to recover land by an action *in rem*, whereas the owner of personal property was restricted to a personal claim, i.e. to damages. While in 1854 this distinction was abrogated, the real/personal property terminology was retained. Directly relevant for present purposes is that both real and personal property also comprise rights. Since originally only freehold estates could be protected by an action *in rem* (cf. *supra*), other rights in land (especially leaseholds) enjoyed protection only by personal actions (cf. *supra*). The latter rights therefore are designated as chattels, but since they relate to land, they are called “chattels real”. Correspondingly, personal chattels (i.e. movables) are divided into corporeal ones – choses in possession; and incorporeal ones – choses in action, such as receivables and intellectual property rights.<sup>15</sup> One author summarizes: “In English law ... ”property” comprehends tangibles and intangibles, ...; it means a tangible thing (land or chattel) itself, or rights in respect of that thing, or rights, such as a debt, in relation to which no tangible thing exists.”<sup>16</sup>

**470. Broad concept of “assets”:** The Netherlands The most modern European Civil Code is the Dutch code, whose books on patrimonial law (books 3, 5 and 6) entered into force on 1 January 1992. This code which is based upon very thorough comparative analyses, contains a novel solution on the core terms of property law. Art. 3:1 gives the following definition: “Assets (*goederen*) are all things (*zaken*) and all patrimonial rights (*vermogensrechten*)”. Art. 3:2 then defines things as all corporeal objects that are susceptible of human control. More relevant for our purposes is the definition of patrimonial rights in art. 3:6: “Patrimonial rights are those which, either separately or together with another right, are transferable; rights which are intended to procure a material benefit to their holder; or rights which have been acquired in exchange for actual or expected material

<sup>11</sup> R. Herrmann and D. Westermann, Schweden, in: v. Bar (ed.), *Sachenrecht in Europa I* (2000) 503; Håstad, *Sakrätt Avseende Lös Egendom*<sup>6</sup> (2000) 40 ss.

<sup>12</sup> K.G.C. Reid, *The Law of Property in Scotland* (1996) par. 3 and n. 1.

<sup>13</sup> K.G.C. Reid loc.cit. par. 13.

<sup>14</sup> K.G.C. Reid, loc.cit. par. 13.

<sup>15</sup> J. Crossley Vaines (-Tyler/Palmer), *Personal Property*<sup>5</sup> (1973) 4-14.

<sup>16</sup> J. Crossley Vaines (-Tyler/Palmer) 3; cf. also the extensive catalogue of intangible movables in Lawson/Rudden, *The Law of Property*<sup>2</sup> (1984) 26-39.

benefit.”<sup>17</sup> One writer summarises the rather complicated and heavy statutory definition by pointing out that transferability, material advantage and exchange value characterize the patrimonial value which justifies the qualification as “patrimonial rights”.<sup>18</sup> Remarkably, it is controversial whether products of the human mind, such as intellectual property, are to be regarded as patrimonial rights!<sup>19</sup> The divisions of the Civil Code are to some degree adapted to those definitions: While book 3 on Patrimonial Law in general contains, *inter alia*, those property rules which apply to assets, book 5 on property deals only with rights in things, especially ownership.

**471. Conclusion** In spite of diverging definitions and terminology, there appears to be unanimity with respect to the result: All legal systems of the member states regard not only corporeal things as the objects of real rights but also incorporeal assets, such as patrimonial rights. This broad conception is most clearly expressed by the recent Dutch CC art. 3:1 (*supra* no. 470). One reason for adopting this broad approach is the increasing dematerialization of negotiable “papers” (i.e., corporeal things), such as money and securities which today co-exist as paper and credit money on the one hand and as certificated and uncertificated securities on the other hand. This broad framework of the law of property will therefore be used in delimiting the field of inquiry in this part of the study. Using the broad concept of property law in this study, comprising both things and patrimonial rights, does not, of course, imply that all the rules applicable to these two main elements of property law are necessarily identical.

## (2.) Characteristics of Property Law as Distinct from Contract Law

**472. Introductory remark** The following remarks are not intended to offer a full-scale comparative survey of the characteristic features of property law in general. For the purposes of the present study it is only relevant to investigate those basic characteristics which distinguish the rules and institutions of property from those on contracts. This brief survey will therefore be limited to two aspects, namely the *numerus clausus* of proprietary rights (*infra* no. 473-474) and their universal effect (*infra* no. 475-476).

**473. Is there a mandatory numerus clausus of property rights?** As the Latin phrase indicates, the principle of *numerus clausus* of real rights has been developed in the Continental legal systems. According to the doctrine of *numerus clausus* only the proprietary rights admitted by law are available for use by the parties, and these are unable to recur to, or to create, any other real rights. This principle is most strongly expressed in two modern civil codes. The Portuguese CC of 1966 provides in art. 1306 par. 1: “1. The

<sup>17</sup> Translation by Haanappel/McKaay, New Netherlands Civil Code. Patrimonial Law/Nouveau Code civil néerlandais. Le droit patrimonial (1990) 4.

<sup>18</sup> *Snijders/Rank-Berenschot*, Goederenrecht<sup>3</sup> (2001) no. 29.

<sup>19</sup> In the affirmative: Asser (-Mijnssen/de Haan), Asser’s Handleiding tot de beoefening van het Nederlands Burgerlijk Recht 3.1. Goederenrecht<sup>14</sup> (2001) 2; *Reehuis/Heisterkamp/van Maanen/de Jong*, Goederenrecht<sup>10</sup> (*Pitlo*, Het Nederlands burgerlijk recht 3) (1994) no. 21. Contra *Snijders/Rank-Berenschot* loc.cit. no. 28.

creation of restrictions with a proprietary effect upon the right of ownership or of dividing up that right is only permitted in the cases provided by the law; any restriction of that right resulting from a legal transaction which does not comply with these conditions, has the character of an obligation.” And the Dutch CC book 3 of 1992 provides in art. 3:81 par. 1 first sentence as follows: “1. He who holds an independent transferable right may create within the limits of that right the limited rights provided by law.” Some civil codes establish catalogues of real rights which may have a similar effect.<sup>20</sup> While in other civil law countries no legislative provisions or catalogues exist, in Austria, Germany, Italy and Scotland the *numerus clausus* is firmly adopted by writers and court practice.<sup>21</sup> In England, several judges have relied on the idea of a closed circle of rights, although without using the Latin term and there is also academic support for the idea of *numerus clausus*.<sup>22</sup> However, in some Continental countries, the idea of a *numerus clausus* of property rights is controversial. This is true for France where a slight majority of contemporary writers and older case law plead for the freedom of creating new forms of real rights. The catalogue of CC art. 543 is not regarded as limitative and freedom of contract is invoked as authorizing the creation of all rights that are not prohibited by the law.<sup>23</sup> Also in Spain, the issue is debated; prevailing opinion pleads for the freedom to create new real rights.<sup>24</sup> This freedom is even supported by some legislative and regulatory provisions on the registration of rights in immovables which are similar to those expressly enumerated, even if they are innominate, i. e. not regulated by law.<sup>25</sup>

<sup>20</sup> Austrian CC § 308; French and Belgian CC art. 543 (but cf. also *infra*); Greek CC art. 973.

<sup>21</sup> Austria: *Kozjol/Welser* loc.cit. 212; Germany: *Baur/Stürmer* loc.cit. 3 no. 7; *Westermann (-Westermann/Gursky/Eickmann)*, *Sachenrecht*<sup>7</sup> (1998) 3; Italy: *Gallo*, *Istituzioni di diritto privato* (1999) 185-187; *Bessone (-Comporti)*, *Istituzioni di diritto privato*<sup>2</sup> (1995) 314 s.; *Trabucchi* loc.cit. 382; Scotland: *Carse v. Coppen* (1951) S.C. 233, 242 per Lord President *Cooper* (I.H.); *Reid* loc.cit. 10-11.

<sup>22</sup> *Millett L.J.* in *Re Cosslet (Contractors) Ltd.* [1998] Ch. 495, 508: “There are four kinds of consensual security known to English law: ...” Quotations from five other cases in *Rudden*, *Economic Theory v. Property Law: The Numerus Clausus Problem*, in *Ekelaar/Bell* (ed.), *Oxford Essays in Jurisprudence. Third Series* (1987) 239-263 (244). Further: *McMeel*, *The redundancy of bailment: Lloyds Mar. & Comm. L.Q.* 2003, 169 ss. (187); *Rudden (supra)* who justifies the doctrine by pointing to the interests of marketability and standardization as well as saving information and transaction costs (252 ss.); cf. also *Lawson/Rudden* loc.cit. 106-108; for security rights *Bridge*, *The English Law of Real Security: Eur.Rev.Priv. L.* 4 (2002) 483-508 (486).

<sup>23</sup> Cf. especially *Malaurie/Aynès (-Théry)* loc.cit. 92 no. 359; *Bergel/Bruschi/Ciamamonti*, *Traité de droit civil. Les biens* (1999) 47-49.

<sup>24</sup> Broad discussion in *Diez-Picazo* loc.cit. III 109-126; the author admits real rights not provided for by legislation, provided these rights comply with the general criteria of a real right and they serve a serious and legitimate economic-social interest (125 s.). *Montes-Penadés* in *Lopez y Lopez/Montes-Penadés* (ed.), *Derechos reales y Derecho inmobiliario registral* (1994) 54-55 establishes other conditions for the recognition of new property rights.

<sup>25</sup> Law on mortgages of 8 Feb. 1946 art. 2 no. 2; Implementing Regulation of 14 Feb. 1947, as amended, art. 7.

**474. Numerus clausus of property rights and freedom of contract** It is obvious that a *numerus clausus* of property rights which exists in a great number of member states, although not in all of them, is in stark contrast to the principle of freedom of contract which is constitutive of contract law. Writers have, however, specified that the contrast is not absolute: in the first place, in the framework of contractual property rights with which this study is concerned (*infra* 477), the parties remain free to agree or not to agree on the creation of an “admitted” real right. Moreover, even within this limit they may have the power to agree on those aspects of the intended property right which the law does not regulate by mandatory rules or does not regulate at all.<sup>26</sup> Realistically, though, the desire to create new property rights, even where allowed, will occur in practice only in exceptional circumstances and will be a very rare exception. Practically speaking, the vast majority of contractual property rights will use the models offered by law. In this perspective, property law’s limits upon party autonomy mark a very decisive difference from contract law.

**475. Universal effects of proprietary rights** A basic and specific feature of proprietary rights is their universal effect. While contractual rights are borne by agreement between two (or more) persons and exist only between the contracting parties, proprietary rights typically are effective against all the world (*erga omnes*). This criterion of a proprietary right is expressly laid down by the Greek CC art. 973 and is already expressed in Austrian CC § 307.<sup>27</sup> However, this idea has also been adopted in all those member states that have been selected for the present study.<sup>28</sup> In many cases, the universal effect of proprietary rights is subject to compliance with prescribed methods of publicity, especially for real rights in immovables, but also for certain rights (especially security rights) in movables.<sup>29</sup> The central significance of a proprietary right’s universal effects is illustrated by the very important practical consequences which can be derived from it: The person entitled to a proprietary right may enforce this against any person who presently holds the asset without being entitled to such detention vis-à-vis the legitimate holder<sup>30</sup> (*droit de suite*) –

<sup>26</sup> Austria: *Koziol/Welser* loc.cit. 212, s. 215; Germany: *Baur/Stürmer* loc.cit. 3 no. 7; Italy: *Trabucchi* loc.cit. 382; Netherlands: *Reehuis/Heisterkamp* 345 no. 591; Spain: *Diez-Picazo* loc.cit. III 108 s.

<sup>27</sup> The first sentence reads: “Rights in a thing to which a person is entitled without regard to specific persons are called real rights.” This is contrasted with rights relating to a thing against specific persons.

<sup>28</sup> Austria: *Koziol/Welser* loc.cit. 212; England: *Bridge* loc.cit. 8 s.; *Lawson/Rudden* loc.cit. 2 s.; *Worthington*, Personal Property Law (2000) 18 s.; France: *Bergel/Bruschi/Cimanonti* loc.cit. 33 no. 37; *Malaurie/Aynès (-Théry)* loc.cit. 90 no. 35, 95 no. 363, 99 no. 368; *Terré/Simler* loc.cit. 30s. no. 36 and 37-38 no. 36; Germany: *Baur/Stürmer* loc.cit. 29 ss.; *Westermann* loc.cit. 8; Italy: *Gallo* loc.cit. 183 s.; *Bessone (-Comporti)* loc.cit. 313; Spain: *Montés Penadés in Lopez y Lopez/Montés Penadés* loc.cit. 38-53. The principle is expressly laid down for mortgages in immovables in CC art. 1876 and for mortgages in movables by the Law on mortgages in movables and non-possessory pledges of 1954 art. 16.

<sup>29</sup> This connection is pointed out, e. g., by *Westermann* loc.cit. 18; *Terré/Simler* loc.cit. 37 no. 36; *Eleftheriadou* loc.cit. 21; *Koziol/Welser* loc.cit. 213.

<sup>30</sup> France: *Bergel/Bruschi/Cimanonti* loc.cit. 34 no. 37; *Terré/Simler* loc.cit. 31 no. 36; Germany:

unless there has been a case of acquisition in good faith. English law differs slightly in that the primary remedy, in conformity with a general principle of the common law, are damages; however, the court has the discretion to order specific restitution.<sup>31</sup> The best proof for the very strong position of the holder of a real right vis-à-vis all other persons is its position in the detentor's insolvency: the holder of a real right in the asset prevails over the detentor's (other) general creditors who have merely personal claims against the detentor.<sup>32</sup>

**476. Universal effects of property rights and contract law** While the *numerus clausus* of property rights, insofar as it is recognized, excludes or limits freedom of contract (*supra* no. 474), the universal effect of property rights does not impinge upon contractual rights. Rather, it points to one of the major differences between property rights and contractual rights. The latter constitute a bilateral relation between two parties and do not, as a rule, affect, or require respect by, third persons. By contrast, property rights may affect, and must be respected by, any third person whosoever who comes in contact with a particular asset.

### (3.) Restriction to Contractual Property Rights

**477. General** Property rights can arise by virtue of contract, statute or law, or judicial decision. Obviously, contractual property rights have the greatest affinity to contract; therefore this part of the study will be limited to them. While apart from creation, elements of party autonomy may have a very limited relevance even in judicial or legal property rights, this is atypical. Moreover, such limited aspects of contract will correspond to equivalent aspects of contractual property rights. Consequently, they will be covered anyway by the analysis of the relationship between contract and contractual property rights.

### (4.) The Qualification of Contractual Rights for Use of an Asset

**478. Hire and leaseholds** Contracts for the use of a movable asset, whether of corporeal things or incorporeal rights (hire in England), are everywhere considered as a type of ordinary contract. By contrast, the qualification of contracts for the use of immovables is not uniform. While in most member states, especially those on the European continent, they are also considered as a type of ordinary contract, English, Scottish and Irish law

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*Baur/Stürmer* loc.cit. 30; Italy: *Gallo* loc.cit. 183; Netherlands: *Snijders/Rank-Berenschot* loc.cit. 45 no. 67. Spain: cf. the provisions cited *supra* n. 28.

<sup>31</sup> Torts (Interference with Goods) Act of 1977, cf. s. 3 (2) (b) and (c) on one hand, and s. 3 (2) (a) *juncto* 3 (3) (b) on the other.

<sup>32</sup> England: *Bridge* loc.cit. 9; *Worthington* loc.cit. 19; France: *Bergel/Bruschi/Cimamonti* loc.cit. 34 no. 37; *Terré/Simler* loc.cit. 31 no. 36; Germany: *Wieling*, *Sachenrecht* (1990) 14; Netherlands: *Snijders/Rank-Berenschot* loc.cit. 46 no. 68. Spain: Law on mortgages in movables and non-possessory pledges of 1954 art. 10 par. 2.

regard them as constituting a proprietary right.<sup>33</sup> Even in some continental countries, contracts for use of immovables may have certain stronger effects than ordinary contracts. For instance, in Austria and Spain such contracts may under certain conditions be entered in the land register; according to Austrian CC § 1095, the user's right is then regarded as a "real right which for the remaining time the succeeding possessor has to tolerate".<sup>34</sup> In effect of a similar, yet general rule (which does not require registration) is to be found in Germany,<sup>35</sup> although without the (misplaced) characterization as a "real right".<sup>36</sup> In spite of the genuinely different qualification of the contracts for use of immovables in Anglo-Scots law and trends for a certain "reification" on the European Continent, it has been decided not to deal with these contracts in the present study. Its emphasis is on the law of movables, and for these all countries are agreed that contracts for use are clearly a type of ordinary contract. It is significant that in most member states the same qualification applies also to contracts for the use of immovables but this issue can be left open.

## II. Contract Law and Transfer of Title in Movables\*

### (1.) Importance of the Issue

**479. Importance of the issue** This part of the study will deal with the relationship between a contract providing for the transfer of title and the actual transfer of title as such. It will also deal with the reverse situation which arises when the contract underlying the transfer of title is terminated and title is retransferred to the original transferor. Unfortunately, in the member states two different solutions have been developed for these important issues which are located at the crossroads of contract and property. As was remarked by *Max Kaser*, one of the leading European jurists and experts in this field: "With this issue we confront one of the central problems of private law, the complexity of which is due to the fact that the law of obligation and law of things meet at this point. The principles that govern this question are the very bases of private property in our legal systems."<sup>37</sup>

<sup>33</sup> In England they are considered for historical reasons as "personal property", i. e. movables, but due to their relation to land as "chattels real": *Crossley Vaines* loc.cit. 4-10; *Megarry/Wade* (-*Harpum*), *The Law of Real Property*<sup>6</sup> (2000) no. 1-010; *Lawson/Rudden* loc.cit. 147-158; Scotland: *Coughlan*, *Property Law* (1995) 34 ss.

<sup>34</sup> A similar effect is spelt out by Spanish CC art. 1549.

<sup>35</sup> CC § 566.

<sup>36</sup> See for criticism of the Austrian legislator's qualification *Rummel* (-*Würth*), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch I*<sup>3</sup> (2000) § 1095 note 1. Spanish CC art. 1549 attributes to the registration an effect vis-à-vis third persons but that also is limited to binding a new owner of the immovable: *Castro García/Gomez de la Bárcena/Poveda a. o.*, *Código Civil. Comentarios y Jurisprudencia*<sup>13</sup> (2002) art. 1549 note.

\* Provided by Rainer in collaboration with Dr. Jakob F. Stagl (Salzburg) and Drobnig.

<sup>37</sup> *Kaser*, *Compravendita y Transmisión de la Propiedad en el Derecho Romano y en la Dogmatica moderna* (1962) 8s.

**480. Restriction to the contract of sale** For both theoretical as well as practical reasons, it has been decided to restrict this part of the study to the contract of sale. This terrible simplification is necessary because otherwise it would be impossible to manage the immense complexity of this issue. Also, this simplification is justified because the contract of sale is statistically the most important of all contracts. In addition, some legal systems, in their rules on barter contracts and contracts for the supply of goods to be manufactured by the producer (unless the party ordering the goods undertakes to supply a substantial part of the materials) declare applicable the rules on the contract of sale.<sup>38</sup>

## (2.) Two Approaches to Transfer of Title

**481. The unitary approach** The unitary approach is applied above all in France, Belgium, Luxemburg, England, Italy and Portugal. For a long time France was the only but very prominent exponent of this transfer system and wherever else this system is applied nowadays, as in Sweden for consumer-sales, the *Code civil* has been the model. In England, the Sale of Goods Act is heavily influenced by the French code as well,<sup>39</sup> although the legislative distinctions between the contract to sell (“... the transfer of property is to take place at a future time or subject to some condition ...”) and the “sale” (“... the property in the goods is transferred from the seller to the buyer ...”) smacks of the split approach.<sup>40</sup> Concerning the *common law* it seems that in ancient times a transfer based on a deed was abstract (split approach), but it is quite impossible to draw any further conclusion, because the requirement of delivery – as an indication to the split approach – is based purely on case law.<sup>41</sup> According to French CC art. 1583, the buyer acquires ownership in the moment of consensus, without having been delivered the goods or having paid the purchase price.<sup>42</sup>

**482. The split approach** The split approach is derived from Roman law. The Roman lawyers required *traditio* (delivery) to let the title pass to the buyer.<sup>43</sup> At first, civil lawyers considered the delivery to be mainly a physical act, which under certain circumstances can be substituted by forms that are more symbolic. This concept is still valid in Spain,<sup>44</sup>

<sup>38</sup> Cf., e.g., German CC §§ 480 and 651; cf. also CISG art. 3 (1).

<sup>39</sup> Concerning the SGA see *Chianale*, La recezione della formula declamatoria francese nella vendita mobiliare inglese: *Vacca* (ed.), *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica* (1991) 843 ss.

<sup>40</sup> SGA s. 2 (4) and (5); subsection 6 adds that an agreement to sell becomes a sale “when the time elapses or the conditions are fulfilled”.

<sup>41</sup> A very good summary for English law is to be found in *van Vliet*, *Transfer of movables in German, French, English and Dutch Law* (2000) 115 ss., 130 ss.

<sup>42</sup> The same provision is in force in Belgium and Luxembourg. In Italy the corresponding rule results from CC art. 1470 *juncto* art. 1376; cf. also art. 1476 no. 2.

<sup>43</sup> *Kaser/Knützel*, *Römisches Privatrecht*<sup>17</sup> (2003) § 24.

<sup>44</sup> *A. López y López/V. Montés Penadés*, *Derechos Reales y Derecho inmobiliario registral* (1994) 103 ss.

the Netherlands and Sweden with the exception of consumer – sales. It was also the original concept of the Austrian civil code.<sup>45</sup> During the 19th century the German school of Roman civil law, the *Pandektistik*, began to distinguish between the contract of sale, which simply obligates the seller to transfer ownership, and an additional contract, a disposition, which effects the transfer, if the goods are delivered.<sup>46</sup> In order to let the title pass *two* distinct contracts (the contract of sale and the disposition-contract) and delivery are required.<sup>47</sup> This distinction makes sense if the contract of sale is not performed at once by the seller but the transfer of ownership occurs later.<sup>48</sup> The distinction is even necessary if the disposition and therefore the transfer of title are *independent* of the validity of the underlying contract of sale, *Abstraktionsprinzip*.<sup>49</sup> As a result the buyer may acquire ownership albeit the contract of sale is void. Today this transfer system is applied in Germany.<sup>50</sup>

**483. Vacillating concepts: Austria** Due to the influence of German law in the 19th and 20th centuries some countries like Austria adopted the *Trennungsprinzip* though not the *Abstraktionsprinzip*. In Austria, the buyer can acquire ownership only in case of a valid contract of sale and, of course, delivery.<sup>51</sup> The foremost reason why *e. g.* Austria did adopt the *Trennungsprinzip* is that otherwise it would be almost impossible – at least in the minds of civil lawyers – to explain how a reservation of title in a contract of sale can be legally possible. Being foreign to the original concept of the Austrian civil code the *Trennungsprinzip* is not applied with the same theoretical strictness as in Germany: Whereas some are of the opinion that the parties conclude a distinct second contract at the moment of delivery just as in Germany,<sup>52</sup> the Supreme Court<sup>53</sup> and other legal authorities are of the opinion that the contract of sale and the disposition coincide.<sup>54</sup> The former opinion leans more on the German, the latter more on the French model.

<sup>45</sup> *Klang* (-Bydłinski), Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch<sup>2</sup> (1978) IV 2, p. 371.

<sup>46</sup> The so-called *Trennungsprinzip*, cf. *Hofmann*, Die Lehre vom titulus und modus adquirendi und der iusta causa traditionis (1873).

<sup>47</sup> German CC §§ 433 and 929.

<sup>48</sup> A legislative example is to be found in the English SGA s. 2 (4) to (6), cf. *supra* no. 481.

<sup>49</sup> This system is not directly derived from Roman law, because the Romans did not decide this question; compare Dig 12, 1, 18 on the one side and Dig 41, 1, 36 on the other side. Rather it was *von Savigny*, Obligationenrecht, vol. 2, p. 254 et seq. who invented the *Abstraktionsprinzip*; see *Flume*, Allgemeiner Teil des Bürgerlichen Rechts – Das Rechtsgeschäft (1992) § 12 III 2.

<sup>50</sup> *Jauernig* (-*Jauernig*), Kommentar zum Bürgerlichen Gesetzbuch, § 854 para 13.

<sup>51</sup> CC § 380.

<sup>52</sup> *Schwimmann* (-*Klicka*), Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch<sup>2</sup> (1998) § 380 no. 1; *Koziol/Welser*, Bürgerliches Recht<sup>12</sup> (2001) II 290 ss.

<sup>53</sup> OGH 23 Nov. 1994, SZ 67 no. 213 p. 555 (558); OGH 18 June 1986, Österreichisches Bank-Archiv 1987, 51 with note *Iro*.

<sup>54</sup> *Klang* (-Bydłinski), loc.cit. IV/2 p. 371 ss.; *Rummel* (-*Spielbüchler*) Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch<sup>3</sup> (2000) § 425 no. 2.

Taken all in all the Austrian approach can be seen as a compromise: On the one hand, the contract of sale does not effect the passing of title – as in France – on the other hand this approach does not need a separate real agreement – as in Germany – but rather a “volitional delivery”. For this *Karl Larenz*, one of the most prominent German legal writers preferred the Austrian approach to the French and the German.<sup>55</sup>

### (3.) The Blurring of the Difference between the Two Approaches

**484. Unitary approach** French law, the leading representative of the unitary approach, admits important exceptions to the rule that the buyer acquires property in the moment of consensus. The most striking example is the Code’s solution of the problem of double selling. Art. 1141 provides: «*Si la chose qu’on s’est obligé de donner ou de livrer à deux personnes successivement, est purement mobilière, celle des deux qui en a été mise en possession réelle est préférée et en demeure propriétaire encore que son titre soit postérieur en date, pourvu toutefois que la possession soit de bonne foi*». Two persons purchase the same good successively: The buyer who actually receives possession in good faith remains – and is regarded as – the legal owner. Corresponding provisions are to be found in England and Italy.<sup>56</sup> It is impossible and has been tried in vain to reconcile the French provision with the principle that the buyer acquires ownership at the moment of consensus. Another very important exception to the *solo consensu* principle regards future and unascertained goods. In England, the passing of title takes place in a way which is very similar to the real agreement (*dinglicher Vertrag*) in the split approach.<sup>57</sup>

**485. Split approach** On the other hand, there are two important exceptions to the German rule that delivery is required for the transfer of title: *constitutum possessorium* and *brevi manu traditio*, the *former* being a constructive delivery without transfer of physical possession, the *latter* being a constructive delivery to a buyer being already in possession of the goods.<sup>58</sup> Both these practically important exceptions come very close to a transfer of title by mere consent.<sup>59</sup> They were already acknowledged by Roman lawyers for being a necessity for a developed economic system.<sup>60</sup>

**486. Historical reasons for rigid adherence to principle in continental legal reasoning** The blurring of the difference between the two approaches described in preceding paragraphs is the reason why in describing the two major solutions the term “approach” is used rather than “systems” or “principles”. These terms would imply that the different approaches stick firmly to their own principles – just the contrary is true. If this is the case, why do legal authorities in Europe speak of “principles” or “systems”? These terms and the ideas that go with them are an attempt at solving all legal questions concerning the acquisition

<sup>55</sup> *Karl Larenz*, Lehrbuch des Schuldrechts I/2<sup>13</sup> (1986) 18 ss.

<sup>56</sup> English SGA s. 25 (1); Italian CC art. 1155.

<sup>57</sup> SGA s. 18 rule 5 (1); cf. *van Vliet* loc.cit. 105.

<sup>58</sup> German CC § 930 on the one hand and § 929 second sent. on the other hand.

<sup>59</sup> *Jauernig (-Jauernig)* loc.cit. § 929 no. 2.

<sup>60</sup> *Kaser/Knütel* § 20, 5, 6.

of ownership from one specific point of view. These principles may have been found by way of induction but since a long time they are used in a deductive way. Solutions to problems are intended to be derived from these principles. However, since the world is not made of principles the solutions found by this deductive method collide with normal life and the necessities of a developed economic system. To give an example: During the 19th century, the German legal doctrine developed the idea that a pledge is only possible if the pledgee is in possession of the item. For this reason the German civil code, dating from 1896/1900 does not know a nonpossessory pledge.<sup>61</sup> This was of course very logical but not up to date; the economic system needed a nonpossessory pledge. This necessity was the reason for inventing *contra legem* the security transfer of ownership.<sup>62</sup> At this point, the decisive question arises: Why do continental lawyers stick to their old ways of theoretical thinking, to this kind of legal dogmatism? This legal dogmatism was developed by the glossators, the commentators on the Digest of *Justinian*, in the Middle Ages. The glossators more or less applied the most advanced method of thinking of their time, the medieval method of theological reasoning (scholasticism) to their own subject, which is a strictly logical, hierarchical way of thinking. This method has ever since had an overwhelming influence on continental legal reasoning.<sup>63</sup> This specific way of legal reasoning is very hard to overcome for anyone who is used to it. Although the starting points differ, the results of the unitary and the split approaches do not differ very much. It is an acknowledged principle of comparative law that legal systems may differ widely concerning their rhetoric but come to very similar solutions concerning the legal issues at hand (*praesumptio similitudinis*).<sup>64</sup> Nevertheless, the different approaches are regarded as sacred principles in their native countries.

**487. Conclusion** Which conclusions must be drawn from the preceding survey concerning the interaction of contract law and the transfer of property? One major point at which contract law “interferes” with property law is the unitary approach of some legal systems under which the mere conclusion of the contract effects the transfer of ownership of specific goods to the buyer. For a full appreciation of the consequences of this approach it would be necessary to take into account also the consequences upon the “interested” third parties, i. e. the general creditors of the buyer and the seller, respectively. Unfortunately it was impossible to cover these issues as well. Contrary to our expectations, the few enterprises that reacted to the issue mentioned, unanimously denied that in practice the divergent solutions on passing of ownership either by conclusion of the contract of sale or by delivery are relevant in border-crossing commercial practice.

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<sup>61</sup> CC § 1205.

<sup>62</sup> *Baur/Stürmer*, Sachenrecht<sup>17</sup> (1999) § 55 I 3 b.

<sup>63</sup> *Wieacker*, Privatrechtsgeschichte der Neuzeit<sup>2</sup> (1967), 45 ss. See also *Koschaker*, Europa und das Römische Recht<sup>4</sup> (1966).

<sup>64</sup> *Esser*, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts<sup>2</sup> (1964) 346 ss.

#### (4.) The Passing of Risk

**488. Introduction** For a long time this issue was heavily influenced by the Roman principle of *periculum est emptoris*, the buyer has to bear the risk of loss or damage to the goods, whether or not he has become their owner.<sup>65</sup> The French *Code civil* decided that since the buyer has to carry the risk he should also be the owner of the goods.<sup>66</sup> This is one reason why the French adopted the unitary approach based upon consensus. The German civil code emancipated itself from this Roman rule. The risk passes to the buyer only when he is able to physically control the goods, i. e. at the time of delivery.<sup>67</sup>

**489. Unitary approach** The risk of loss or damage to the goods passes to the buyer at the time the contract is concluded. The words “*où elle a dû être livrée*” in French CC art. 1138 par. 2 precisely reflect this rule because the seller has to deliver the goods immediately. According to an established practice, loss of the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price.<sup>68</sup> In some cases, the risk of loss or damage does not pass to the buyer at the moment the contract is concluded. This holds true for unascertained goods<sup>69</sup> or future goods or if the passing of title is subject to a condition (resolatory or suspensive)<sup>70</sup> or limited in time. In case of conditions or limitations in time, ownership does *not* pass to the buyer even if the goods have been delivered.<sup>71</sup> If the seller fails to deliver the goods in due time (delay) the risk of loss or damage to the goods revolves back to him, unless he can prove that the loss or damage would have occurred also if he had delivered the goods in due time.<sup>72</sup> Since the seller is bound to place the goods at buyer’s disposal within reasonable time, it can easily happen to the seller that risk of loss or damage to the goods revolves back to him if he does not have a right of retention for some reason. Similar rules can be found in Italy.<sup>73</sup>

**490. Split approach** Under this approach, a special rule provides that risk passes to the buyer independently of the transfer of ownership. Risk passes, as a rule, when control over the goods sold passes to the buyer, i. e. upon delivery. This rule applies in Austria, Germany, The Netherlands and in Spain.<sup>74</sup>

**491. Conclusion** It would be unnecessary to deal in the present context with the passing of risk, a genuinely contractual issue, were it not for the “French” rule under which the contractual issue of risk depends upon a proprietary criterion. Property law as such can be

<sup>65</sup> Kaser/Knütel loc.cit. § 41, 20 ss.

<sup>66</sup> CC art. 1624, 1138 par. 2, 1583, 711.

<sup>67</sup> German CC § 446; Austrian CC §§ 1049 and 1051.

<sup>68</sup> Cass.civ. 12 Jan. 1994, Bull. civ. I no. 23; Cass.civ. 10 Oct. 1995, Bull. civ. I no. 361.

<sup>69</sup> Expressly Italian CC art. 1465 par. 3.

<sup>70</sup> For the latter cf. French CC art. 1182.

<sup>71</sup> Cass.civ. 4 July 1995, Bull. civ. I no. 305; Cass.civ. 13 Nov. 1997.

<sup>72</sup> French CC art. 1302 par. 2.

<sup>73</sup> Cf. Italian CC art. 1465.

<sup>74</sup> For Austria and Germany, cf. *supra* n. 1664; Dutch CC art. 7:10 and 7:11; Spanish CC art. 1452.

neutral since it is not affected by the outcome on the level of contract law. By contrast, from the viewpoint of contract this connection does not appear to be fortunate since the contractual question of who bears the risk should be answered by contractual rather than proprietary criteria. This conclusion is also supported by practitioners who say that the issue of risk is usually dealt with by agreement of the parties.

### (5.) Voidness and Termination of the Contract

**492. Introduction** A contract may be either void *ab initio* or voidable; if a voidable contract is avoided by a party it is regarded as void *ab initio* as well. Voidness for reasons of illegality, immorality or lack of capacity or avoidability for reasons of incorrect information or defects of consent must be distinguished from termination of the contract due to non-performance. Termination of the contract may work *ab initio* or *ex nunc*.

**493. Unitary approach** If a contract is void or a voidable contract has been avoided the contract is rescinded *ab initio*. Where the seller has delivered the goods and the buyer does not pay the purchase price, in all legal systems the seller may terminate the contract. In this case, the contract of sale is regarded as void *ab initio*. This has the effect that the seller never has lost ownership of the goods and the buyer has to return them to the seller as the owner (*à titre de propriétaire*).<sup>75</sup> The seller/owner may recover his property by *vindicatio*. In those countries like Austria, The Netherlands, Spain and partially Sweden, which need a valid contract of sale for the passing of title, termination or avoidance of the contract has the same effect; the seller becomes the owner automatically again and may recover his property by *vindicatio* or bring an action for unjust enrichment in case the goods were damaged or got lost.<sup>76</sup> The situation is quite similar in English law; the seller's power to resell the goods in this case and his power to retake the goods belonging to common law some of the questions involved are still unsettled.<sup>77</sup> Where the buyer has not yet returned the goods to the seller, the latter can bring a third party action against executions issued by the buyer's creditors.<sup>78</sup> Consequently, it is the seller's and not buyer's creditors, who are protected by these rules. A transferee from the buyer may acquire ownership by the buyer if it is in good faith regardless of the voidness or termination of the first contract of sale.

**494. Split approach** In the countries applying the split approach ownership does not revert back automatically to the seller.<sup>79</sup> The latter therefore cannot bring an action for *vindicatio* but must claim return of the goods on the basis of unjust enrichment. The buyer is obligated either to transfer ownership in the goods back to the seller or to compensate the loss of the goods. Since the buyer before transfer of ownership remains the owner of

<sup>75</sup> France: *Mazeaud/Mazeaud(-de Juglart)*, *Leçons de Droit Civil III/14* (1974) 283.

<sup>76</sup> Austria: OGH 29 Feb. 1994, SZ 57 no. 44 p. 208 s.

<sup>77</sup> *Beale (-Guest/Harris)* loc.cit.§ 43-347.

<sup>78</sup> Cf. *supra* no. 30.

<sup>79</sup> German CC § 346.

the goods he can transfer ownership *pleno iure* to a third party, who does not have to be in good faith. This solution being unjust, German lawyers give in some cases the seller an action against either the acquiring party or the seller, the details of which are too complicated to be discussed in this context.<sup>80</sup> As long as the buyer does not retransfer title to the goods back to the seller the latter cannot bring a third party action against executions issued by the buyer's creditors.<sup>81</sup>

**495. Conclusion** Upon nullity and termination with retroactive effects of a contract of sale, on the proprietary level the reverse situation arises as upon conclusion of the contract. It must therefore suffice to refer to *supra* no. 487.

## (6.) Passing of Risk upon Termination of Contract

**496. Introduction** A consequential issue concerning the termination of contract is the question who is to bear the risk of loss or damage to the goods, the buyer or the seller? Here again the unitary and the split approach to transfer of ownership come to different results.

**497. Unitary approach** As stated above (*supra* no. 492) the seller becomes owner of the goods again upon termination of the contract and he may recover his property. It follows therefore that the seller, being the owner again, carries the risk of loss or damage to the goods as well.<sup>82</sup>

**498. Split approach** It is not astonishing as well that German law should come to the opposite conclusion: Where the contract is terminated the buyer remains the owner of the goods until he transfers the property back to seller. For this reason he, the buyer, has to carry the risk of loss.<sup>83</sup>

**499. Conclusion** The passing of risk upon termination of contracts of sale is governed by the same two divergent approaches that characterize the issue in the context of the conclusion of a contract of sale. Therefore reference can be made to the conclusion which was reached earlier on that issue (*supra* no. 491).

## (7.) General Conclusion

**500. Comprehensive importance of unitary/split approach** Which general conclusions on the interference of contract law with the transfer and retransfer of ownership under a contract of sale can be drawn on the basis of the preceding analyses? One general

<sup>80</sup> For details, cf. *Jauernig (-Jauernig)* loc.cit. preliminary remarks no. 14 ss. preceding § 854.

<sup>81</sup> *Thomas/Putzo*, ZPO-Kommentar<sup>23</sup> (2002) § 771 no. 18.

<sup>82</sup> France: CC art. 1302, 1379; cf. *Mazeaud/Mazeaud (-de Juglart)* loc.cit. 283. Italian CC art. 2037 distinguishes as to whether the buyer was in bad or in good faith.

<sup>83</sup> CC § 346 par. 2 no. 3.

observation can be made. The decision for the unitary or the split approach has an important impact on the transfer of ownership both at the conclusion of a contract of sale as well as upon its nullity or termination *ex tunc*. It is true that in important fact situations the differences are strongly mitigated (*supra* nos. 484-485). However, it remains true that the sale of specific goods still is of very great practical importance. The interference of contract law with property law is very strong under the unitary approach both with respect to the transfer of ownership as well as the passing of risk. By contrast, under the split approach, property law insulates itself from such impact. This observation confirms the conclusion that it must be left to property law to assert its independence from contract law, wherever it so desires. Of course, any relevant changes of this kind will have to be accompanied by corresponding amendments of the relevant rules of contract law in order to harmonize the relevant provisions of these two branches of law.

### III. Contractual Security Rights in Movables and Contract Law

#### (1.) Introduction

501. **Survey** This part of the study will investigate the interrelationship between contractual security rights in movables and contract law for four issues:

- (i) creation of security rights (*infra* (2.));
- (ii) impact of invalidity of the security agreement upon the security right (*infra* (3.));
- (iii) dependence of the security right upon the secured claim (*infra* (4.));
- (iv) scope of freedom of contract (*infra* (5.));

This will be followed by a "General Conclusion" (*infra* (6.)).

502. **Security rights and functional equivalents** The law of security rights in movable assets (*supra* no. 471) is characterized by a broad variety of instruments and terms, varying not only from member state to member state, but usually also within each of the member states. This confusing variety of institutions and concepts is exacerbated by the fact that in many countries the catalogue of truly proprietary security rights is supplemented by contractual arrangements which have been used in order to achieve the same purposes as a genuine proprietary security right. The most famous example is the reservation of title which appears to be nothing but a simple clause in an ordinary contract of sale but undoubtedly fulfils the function of securing payment of the purchase price which has been credited by the seller to the buyer. Functionally, the retention of title is undoubtedly a security device, and this is increasingly acknowledged by special rules that have been enacted here and there by legislatures or have been developed by the courts. Retention of title, therefore, will be covered in this part of the study. – Another device located at the borderline between contract and functional security is financial leasing. Like the reservation of title it is very frequently used for the secured financing of suppliers' credits. However, as distinct from the reservation of title, it need not fulfil the function of securing purchase money credit; it is frequently also used for leasing property, i. e. for the temporary granting of a right to use the lessor's assets. Because of this double function of financial leasing and since this institution has not yet

clearly and broadly been integrated into a comprehensive system of security rights it will not be covered in this part of the study. – A related “institution” is the combination of a sale with a lease-back by the “buyer” to the “seller”. This form of leasing can be used by the seller for raising capital in exchange for an obligation to pay rents for the re-leased assets. Depending upon whether sale and lease-back is for an unlimited time and without the “buyer’s” obligation to return the leased assets after “the seller” has repaid capital (and interest), the transaction may or may not perform the function of a credit secured by a security transfer of the back-leased assets. Again, in view of this open issue, sale and lease-back will not be covered by this part of the study.

**503. Relevance of contracts for security rights: two basic patterns** Most important events in the life of contractual (*supra* no. 478) security rights in movables are triggered by a contract concluded between the grantor of the security (usually the debtor of the secured claim but occasionally also a third person) and the grantee (the creditor of the secured claim). This applies especially to the creation of the security, but also to contractual amendments and transfers, and to its contractual extinction. Which impact has the contract providing for the creation of the security by the grantor in favour of the grantee (the security agreement which may be contained in the credit agreement obliging the creditor to grant a loan to the debtor) upon the creation (or a change or extinction) of the proprietary security right? The member countries have developed (or rather inherited) two basically different approaches to this issue.

**504. The unitary approach** France and Italy have adopted the so-called unitary approach. Under this approach, the security agreement between debtor and creditor in which debtor and creditor agree that as guarantee for a credit a security right shall be created by the debtor (or a third party grantor) does not only give birth to an obligation to create (or change or extinguish) the security right, but that effect attaches by virtue of the law to the effective conclusion of the contract. It is a contract with a proprietary effect.<sup>84</sup> From the viewpoint of the grantor of a proprietary security right, the security agreement therefore constitutes a disposition.<sup>85</sup> It must be added, though, that what is gained by widening the effect of the contract is obtained at the expense of the unity of property: not all proprietary effects of ownership or any other real right are achieved by conclusion of the contract; certain effects against third persons are not obtained until additional acts have been accomplished. This result is avoided in Spain where delivery is

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<sup>84</sup> Italian CC art. 1376 provides for “Contracts with real effects”: “In contracts having as their object the transfer of ownership of a specified thing, the constitution or transfer of a real right (1465) or the transfer of another right, such ownership or right is transferred and acquired by virtue of the lawfully expressed agreement of the parties.” In France, CC art. 711 provides that ownership of things is acquired by, *inter alia*, “the effect of contracts”. Contracts whose object is the transfer of a real right are also called *contrats avec effet translatif*, cf. *Atias*, *Droit civil. Les biens*<sup>3</sup> (1993) 195.

<sup>85</sup> France: *Mestre/Putman/Billau*, *Traité de droit civil. Droit commun des sûretés réelles. Théorie générale* (1996) 264 no. 279.

demanded both for contracts of sale and pledges.<sup>86</sup> However, in several instances physical delivery can be replaced by mere agreement.<sup>87</sup>

**505. The split approach** Another group of member states follows an alternative approach which limits the effect of the security agreement to create obligations between the contracting parties. In order to create the proprietary effects envisaged by the contract, an additional act directed at the creation (or amendment, transfer or extinction) of property rights is necessary. In some countries of this group it is thought necessary that this additional act which does not necessarily take place at the same time as the conclusion of the security agreement must be supported by an additional agreement, the so-called real agreement. While restricting the effect of the security agreement to its purely contractual purpose and requiring an additional proprietary act (and sometimes even an additional agreement), this approach achieves with one stroke the full proprietary effects of the intended transaction. The general scheme of this split approach is expressly laid down by the Austrian Civil Code which expresses the distinction of the *ius commune* between *titulus* (title) and *modus* (means) of acquisition of property rights. While CC § 424 enumerates the various titles for the acquisition of ownership – *inter alia* a contract, § 425 starts out by the negative statement that “The mere title does not yet grant ownership. Ownership and proprietary rights can, except where otherwise provided by law, be acquired only by lawful delivery and acceptance.”. Without using this somewhat antiquated vocabulary, the same approach is followed in Germany and The Netherlands.<sup>88</sup> However, all three countries replace delivery where it would not make sense to require it, *i. e.* where either the transferee already holds the assets to be acquired or the parties have agreed that the transferor is to hold the assets for the transferee. In both cases, delivery is replaced by a corresponding real agreement.<sup>89</sup>

**506. The “real” contract under the split approach** Among the three countries embracing the “real” contract, Germany is the most pronounced champion. The Civil Code expressly mentions it and underlines its special features by coining a special term, *Eini-gung*,<sup>90</sup> which may be rendered as “real agreement”. The “real agreement” is an essential part of the performance of any contract obliging one party to transfer ownership or any other property right in an asset to the other party. It is the legal “companion” of the transfer of possession or of registration of immovables or certain special kinds of movables. In some typical cases, a real agreement may even substitute delivery where that would be futile or is not desired. Unless modified by specific rules on property law, the real agreement is subject to the provisions of the general part of the Civil Code (which

<sup>86</sup> CC art. 1445 and 1863.

<sup>87</sup> CC art. 1462 par. 2 (public document); CC art. 1463 (impossibility of delivery and case of *traditio brevi manu*).

<sup>88</sup> Germany: *Baur/Stürmer* loc.cit. 44 ss.; *Wieling* loc.cit. 37-40; Netherlands: prevailing opinion, cf. *Asser (Mijnssen/de Haan)* loc.cit. 165-168 no. 207; *Snijders/Rank-Berenschot* loc.cit. 265-268 no. 325-328; *Reehuis/Heisterkamp/von Maanen/de Jong* loc.cit. no. 131. This opinion is supported by the pre-1992 case law of the Supreme Court and impliedly also by CC art. 3:95.

<sup>89</sup> Austrian CC § 428; Dutch CC art. 3:115; German CC § 929 second sent. and § 930.

<sup>90</sup> CC § 873 and 929.

include rules on legal transactions in general); by contrast, the general rules on contracts do not apply since these are aimed at creating obligations.<sup>91</sup> Generally speaking, the “real” contract is not a separate instrument but is implied in the underlying contract, e. g. the contract of sale. This holds true especially where the conclusion of the underlying contract and its performance more or less coincide. Matters are different where performance takes place later; an important and relevant example is a contract of sale with reservation of title: the unconditional contract of sale obliges the seller to deliver to the buyer, and the buyer to pay the purchase price; but by the “real” contract the transfer of ownership is made conditional upon full payment of the purchase price.<sup>92</sup> – In Austria and the Netherlands, the civil codes do not mention a “real” contract, but courts and prevailing opinion of writers have adopted the idea.<sup>93</sup> In Austria, a recent writer and some recent decisions of the Supreme Court regard the “real” contract as an element of the underlying contract; the transferor’s intention to transfer title and the transferee’s corresponding intention, however, must still be present at the time of delivery.<sup>94</sup> In the new Dutch Civil Code, one special case – apart from the earlier mentioned cases of *constitutum possessorium* and *brevi manu traditio*<sup>95</sup> – has been regulated on the basis of the practice of the Supreme Court: delivery by the owner of his stolen goods takes place “by a deed intended for that purpose.”<sup>96</sup> A Dutch writer has underlined that the “real” contract tends to be relevant if delivery takes place some time after conclusion of the underlying contract and legally relevant circumstances intervene such as an execution by one of the transferor’s creditors, insanity of the transferor etc.<sup>97</sup>

## (2.) Creation of Security Rights

**507. Relevance of general principles** Generally speaking, the creation of security rights follows to a large degree the general pattern set out in the preceding Introduction (*supra* nos. 467 ff), at least as far as the contractual elements of creation are concerned. These are of primary relevance for the present study for understanding and appreciating the different fundamental approaches.

**508. Emphasis on contractual elements** In order to properly focus the following analysis to the topic of the present study, the inquiry will concentrate on the contractual elements of the creation of proprietary security rights. By contrast, the non-contractual

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<sup>91</sup> *Baur/Stürmer* loc.cit. 35-46; *Wieling* loc.cit. 23-46.

<sup>92</sup> *Baur/Stürmer* 742.

<sup>93</sup> Austria: *Koziol/Welser* loc.cit. 213 s., 276 s., 290 s., 320; *Holzhammer/Roth*, Einführung in das Bürgerliche Recht mit IPR<sup>5</sup> (2000) 250 s.; *Schwimann* (-Klicka), Praxiskommentar zum ABGB II<sup>2</sup> (1998) § 425 no. 2.

<sup>94</sup> *Rummel* (-Spielbüchler), Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch I<sup>3</sup> (2000) § 425 no. 2; Supreme Court 23 Nov. 1994, SZ 67 no. 213 p. 555 (558); S.Ct. 18 June 1986, Österreichisches Bank-Archiv 1987, 51 with note *Iro*.

<sup>95</sup> *Supra* no. 485.

<sup>96</sup> CC art. 3:95; cf. *Snijders/Rank-Berenschot* loc.cit. 275 no. 340.

<sup>97</sup> *Snijders/Rank-Berenschot* loc.cit. 268 no. 328.

aspects which of course are most significant to obtain a full picture of the process of creating real security rights in movables, must in the present context of necessity be neglected and can only be very briefly summarized.

**509. Two functions of contract for creation of contractual security rights** Since this part of the study deals with the creation of *contractual* security rights (*supra* no. 477) in movables, contract as their source obviously must play a very prominent role. However, at least two different functions of contract must be distinguished at this stage, the security agreement on the one hand and the proprietary function(s) of contract on the other hand. The respective relevance of these two types of contract for the present study differs.

**510. The security agreement** The security agreement is the primary contract between the grantor of the security and the grantee to constitute a security in specified assets for the purpose of securing a monetary obligation of the grantor to the grantee. It is also possible that a third party and not the debtor of the secured claim promises to create the security. This security agreement may be a separate contract; but more often than not it is merely a (more or less elaborate) clause in another contract, especially the credit agreement between creditor and debtor. The security agreement fulfils important functions: not only is it the basis (the *causa*) for the subsequent creation of the security right; indirectly, in the framework of the so-called principle of dependence it exercises a decisive influence upon the security right. Nevertheless, the security agreement as such is outside the field of the present inquiry. It is a contract (in English parlance: an executory contract) that is performed by the grantor's creation of the security right in favour of the grantee and by the latter accepting it as due performance of the security agreement. The security agreement is distinct from the creation of a contractual security right. This is expressly spelt out by the few relevant provisions of some older Continental civil codes which expressly distinguish between the contract by which the constitution of a pledge is promised and the contractual constitution of the pledge.<sup>98</sup> Its conclusion, validity, interpretation, performance or non-performance are subject to the general rules of contract law. While a security right often depends upon the validity and the terms of the security agreement, the reverse is not true: the security agreement is independent of the security right which has been created in its performance. A system of harmonized or unified European contract law would apply directly to security agreements.

**511. Contractual elements in the creation of security rights proper: a note on the historical trend** The older Continental civil codes emphasize the contractual nature of the (possessory) pledge by calling this institution "pledge contract".<sup>99</sup> This reflects the conception of the 19<sup>th</sup> century where pledge and real estate mortgage were not yet unqualifiedly regarded as institutions of property law. Rather, they were conceived as belonging to an intermediate area, namely the securing of contractual obligations<sup>100</sup> or as

<sup>98</sup> Austrian CC § 1368 second sent. as contrasted to the first sent.; Spanish CC art. 1862.

<sup>99</sup> Austrian CC § 1368 first sent. (cp. preceding n.); French CC art. 2071; Spanish CC art. 1857 par. 1, 1858, 1861, 1863, 1866.

<sup>100</sup> Austrian CC part III dealing with provisions common to personal and real rights; typical is

one of the methods of obtaining property, together with succession and contract law (France) or as one of the specific types of contracts (Spain). The old Austrian idea of protecting contractual obligations has been taken up by the Italian CC of 1942 which deals with pledge and mortgage in book 6 on the protection of rights. By contrast, the German CC of 1900 and the parts of the new Dutch CC dealing with patrimonial rights of 1992 conceive of the pledge as an institution of property law. All the codes of the 20<sup>th</sup> century do no longer mention the contractual aspects but emphasize the proprietary ones.

**512. The present role of contract in the creation of security rights: the general rule** As the preceding brief historical sketch indicates, one can clearly perceive in the classical institution of the pledge a new emphasis upon its proprietary purpose and environment in lieu of its contractual roots. This movement is confirmed by the great variety of new security instruments that have been developed in all member states to cope with new economic demands of securing credit. Generally speaking, the creation of a security right, be it possessory or non-possessory, requires a combination of contractual and “non-contractual”, i. e. proprietary elements. For possessory security rights, this is, as the name indicates, delivery to the grantee/creditor holding for the grantee). For non-possessory security, various substitutes have been instituted that are intended to replace the publicity function which, in the possessory pledge, is performed by the dispossession of the grantor, such as registration, marking, notification etc. Exceptionally, however, the creation of security rights can be effected merely by contractual arrangement between grantor and grantee). In addition, those functional security rights must be mentioned which are part of an underlying contract, such as e. g. a reservation of title in a contract of sale (*infra* no. 514).

**513. Exceptional creation of security rights only by contract: genuine security right** In the field of traditional proprietary security rights, especially the possessory pledge, there are two typical situations in which no real act is required for the creation of the security right. The first occurs where the pledgee is already in possession of the thing to be pledged. Germany expressly provides that in this case only a real agreement (*Einigung*) is required.<sup>101</sup> The same rule can be derived from the Dutch code and has been adopted by writers and courts also in Austria.<sup>102</sup> This exception is so obvious that references from other member states are not called for. – The second exception relates to the less obvious situation where the debtor’s goods to be pledged are held for the debtor by a third person and the third person is to hold it henceforth for the pledgee. In this case an additional act is required in many countries, namely a notice to the third person that he is to hold possession now for the pledgee.<sup>103</sup> – Probably even more remarkable is the fact that in

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§ 1369 which first declares applicable the general rules for contracts but then specifies specific obligations which are partly contractual and partly proprietary.

<sup>101</sup> CC § 1205 par. 1 second sent.

<sup>102</sup> Austria: *Koziol/Welser* loc.cit. 340 with references; Netherlands: CC art. 3:236 par. 2 *juncto* art. 3:95 and art. 3:115 lit. b).

<sup>103</sup> Sweden: Lag 1936:88 om pantsättning av lös egendom i tredje mans besittning; German CC § 1205 par. 2 (which requires, in addition, assignment of the debtor’s claim for return of the

The Netherlands even the non-possessory pledge of things can be created by mere contract; however, this contract must comply with certain formal requirements: it must be established by either a public document or a private writing with a registered date.<sup>104</sup>

**514. Creation of contractual functional security rights** Functional security is almost invariably based upon a fascinating combination of contract and ownership, the latter term to be taken in its broadest sense, *i. e.* as including entitlement to incorporeal rights. Contract is used as a tool to inject into ownership the more limited function of proprietary security. The most prominent and more or less widely used examples are the retention of title, financial leasing, sale and lease-back as well as the security assignment of monetary claims. Of these four types, only three can here briefly be presented.

**515. Retention of title** Retention of title is a highly important instrument of securing suppliers' credits, known in all member states and widely used in many of them. From the viewpoint of contract, retention of title is nothing but a special term in a contract of sale: while this contract as such has all the normal features of a sales contract, its proprietary effect, *i. e.* the transfer of title to the buyer is made conditional upon full payment of the purchase price (and possibly other claims of the seller, where that is permitted). The seller's retained title assures that full effects are attributed to his "security" in the sold goods although these have been delivered to the buyer. Nevertheless, in several major countries, *i. e.* in Austria, Germany, The Netherlands, Sweden and the United Kingdom, the contract of sale with retention of title is fully effective also *vis-à-vis* third persons, without special additional requirements or publicity.<sup>105</sup> By contrast, in some other member states, the security function of the retention of title-clause has induced legislators to establish special conditions in order to achieve full effects for the retention of title clause: in France and Italy, a writing is required.<sup>106</sup> In addition, in France, registration is optional and gives procedural advantages in the buyer's bankruptcy;<sup>107</sup> in Italy registration is required for machinery;<sup>108</sup> and in Spain it is always required in order to give effect *vis-à-vis* third parties.<sup>109</sup>

**516. Financial leasing** This relatively new functional security instrument is not yet specially regulated in most member countries. One exception is France where the

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goods against the third person); Austria: *Koziol/Welser* loc.at. 340 with references; Netherlands: CC art. 3:236 par. 2 *juncto* art. 3:115 lit. c).

<sup>104</sup> CC art. 3:237 par. 1; par. 2 requires in addition that the pledgor has to affirm its right of disposition and has to declare whether or not other proprietary rights incumber the collateral.

<sup>105</sup> Austria: *Koziol/Welser* loc.cit. 370-372; German CC § 449; Dutch CC art. 3:92; Sweden: Report *Håstad*; United Kingdom: cf. Sale of Goods Act 1979 s. 19 (1).

<sup>106</sup> French Code de commerce art. 621-122; Italian CC art. 1524 par. 1 (the writing must have a formally established "certain date").

<sup>107</sup> Code de commerce art. L. 621-116.

<sup>108</sup> CC art. 1524 par. 2.

<sup>109</sup> Ley 28/1998, de 13 de julio, de Venta a Plazos de Bienes Muebles art. 15. In addition, model contracts that have been officially approved must be used.

security aspect of financial leasing is taken into account by requiring registration as a condition for effectiveness against third parties.<sup>110</sup>

**517. Security assignment of monetary claims (accounts)** Security assignment of claims is the only method available in England and Ireland for creating a security in claims, whereas the Continental member countries traditionally also provide for the pledging of claims. However, as in the field of pledging of movable things, an alternative method for creating security has in most countries been developed (except in The Netherlands).<sup>111</sup> Its structure corresponds to that of the security transfer of ownership, *i. e.* the security assignment of monetary claims. In most member countries, the general rules for the assignment of claims are also applied to their assignment for purposes of security. Since those general rules differ in one commercially important respect, that same difference is echoed by the rules on security assignment, *scil.* whether notification of the debtor of the assigned claim (account debtor) is necessary or not in order to achieve full effects as against third parties. England, Germany and Spain do not require such notice,<sup>112</sup> whereas most other countries insist upon this.<sup>113</sup> However, in this latter group of countries, some have acknowledged that at least in commercial relations a required notification of the account debtor may be disadvantageous to the business reputation of the assignor since it may indicate that he is in financial straits and therefore requires outside financing. In order to avoid such negative effects, special rules have been enacted in many countries allowing less burdensome methods of achieving a certain publicity for security assignments.<sup>114</sup>

### (3.) Impact of Invalidity of Security Agreement on the Security

**518. Introduction** Initially, the relevant issues must be clarified. First, invalidity means initial nullity of the underlying security agreement. This excludes mere voidability as long as the contract has not been avoided. After avoidance of the contract there is initial nullity since avoidance has retroactive effect. Secondly, a distinction must be made as to the effect, if any, of the invalidity of the security agreement upon the parties to it, on the

<sup>110</sup> Code monétaire et financier of 2000 art. L. 313-11.

<sup>111</sup> The new Dutch Civil Code of 1992 expressly prohibits any transfer of assets for purposes of security, CC art. 3:84 par. 3.

<sup>112</sup> England: *Goringe v Irwell India Rubber and Gutta Purcha Works* (1886), 34 Ch. D. 128 (C.A.); *Raiffeisen Zentralbank Österreich AG v Five Star General Trading Co. LLC*, [2001] 3 All ER. 257, 282-286 (C.A.); Germany: CC § 398; *Baur/Stürmer* loc.cit. 730 s.; Spain: *Carrasco/Cordero/Marín* loc.cit. 862 ss., 875.

<sup>113</sup> Austria: *Koziol/Welser* loc.cit. 343 with references; Italian CC art. 1265 par. 1; Dutch CC art. 3:94 par. 1; Sweden: Lag om skuldbreve of 1936 §§ 10 and 31.

<sup>114</sup> France: according to the provisions of the famous Loi Dailly (now Code monétaire et financier of 2000 art. L. 313-23 – 313-34), the assignor has to transmit a dated list of the assigned business claims. Austria: notification can be replaced by a dated note in the assignor's business records, cf. *Koziol/Welser* loc.cit. 343; Netherlands: pledges (cf. *supra* n. 1708) can be created without notification by a public or a private, registered document, CC art. 3:239 par. 1.

one hand (*infra* no. 519), and the effect vis-à-vis transferees from the secured creditor, on the other hand (*infra* no. 520).

**519. Effects between the parties** As far as functional security is concerned, such as retention of title or financial leasing, the result is obviously that the nullity of the contract of sale or the leasing contract directly affects the security right which the parties intended to establish. – The true issue, therefore, is limited to “genuine” contractual security rights whose contractual basis is void. Austria and The Netherlands provide expressly<sup>115</sup> that a pledge (the only proprietary security right regulated by the respective civil codes) presupposes a valid security agreement. Other countries derive this result from unwritten general rules of property law: the validity of any proprietary disposition depends upon a valid *causa* which is to be found in the underlying contract.<sup>116</sup> In the countries following the unitary approach (*supra* no. 504) this result derives directly from the rule that each contract with a prohibited *causa* is void.<sup>117</sup> In Germany, the principle of the abstract disposition that applies to the transfer of ownership (*supra* no. 482 *in fine*) is not applicable to the creation of a pledge because this is an accessory right to the secured claim<sup>118</sup>. By contrast, the security transfer of ownership is subject to the ordinary rules for the transfer of ownership and therefore also to the principle of abstraction; consequently, in general its validity does not depend upon the validity of the underlying security agreement, although case law has carved out a number of exceptions from this principle.<sup>119</sup>

**520. Effects of invalidity vis-à-vis third parties** An important group of third parties are those persons who have acquired the encumbered assets from that party who holds the encumbered goods. In the case of non-possessory security rights, this is the debtor. Depending upon the instrument chosen by the parties and available according to the applicable law, this may be a pledge. In this case, the pledgor has remained both the owner and the possessor. Under the ordinary rules of good faith acquisition, the transferee acquires unencumbered property, provided he was in good faith with respect to the non-existence of a pledge.<sup>120</sup> The same result is achieved *mutatis mutandis* in Germany in the case of a security transfer of ownership.<sup>121</sup> Where registration is prescribed and it is effected, the transferee’s good faith may well be destroyed<sup>122</sup> or at least be open to doubt. – The aforementioned rules on the non-possessory pledge apply correspondingly to a disposition made by the pledgee in the case of a possessory pledge.

<sup>115</sup> Austrian CC § 449 first sent.; Dutch CC Arts. 3:84 par. 1, 3:98.

<sup>116</sup> France: Cass.civ. 5 March 1991, D. 1993, 508; Cass.civ. 12 Jan. 1874, D.P. 1874 I 153; Sweden: S.Ct. NJA 1985, 178.

<sup>117</sup> French CC art. 1131, 1133; Italian CC art. 1343-1345.

<sup>118</sup> *Wieling* loc.cit. 682.

<sup>119</sup> *Wieling* loc.cit. 810-811 with references; *Baur/Stürmer* loc.cit. 48 no. 43.

<sup>120</sup> Dutch CC art. 86 par. 1; French CC art. 2279; German CC § 932; Spanish CC art. 464; *Carrasco/Cordero/Marín* loc.cit. 958; Swedish Lag om godtrosförvärv av lösöre.

<sup>121</sup> German CC § 932.

<sup>122</sup> For instance, the Spanish Ley de hipoteca mobiliaria y prenda sin desplazamiento de posesión of 16 Dec. 1954 art. 16 excludes valid acquisition of assets covered by a registered chattel mortgage.

#### (4.) Dependence of the Security on the Secured Claim

**521. The principle of dependence: a security right is only accessory to the secured claim** In the eyes of the continental legal systems, one of the fundamental principles of genuine security rights is that these rights depend upon (are accessory to) the secured claim. This principle is, of course, highly relevant in the context of the present inquiry since it establishes another bridge between proprietary security rights and contract law. In the eyes of some legal systems, the principle of dependence covers also the issue which impact the invalidity of the security agreement has on the validity of the security right (cf. *supra* (3)). – The principle of dependence means that the existence, the extent and conditions under which the security can be enforced by the creditor depend upon the existence, the extent and the conditions of the secured claim. The new Dutch Civil Code art. 3:7 even says that “A dependent right is one which is related to another right in such a fashion that it cannot exist independently thereof.” If the secured claim is assigned or otherwise transferred to another creditor the security right passes automatically to the transferee of the claim. If the secured debt is fully paid by the debtor, the security is extinguished as well. These general rules are well known and need not be supported by special references. This the less so since they are innate to the essence of proprietary security: assets are merely encumbered, and in the case of possessory security have to be transferred into the possession of the pledgee. However, that encumbrance and this transfer of possession is only temporary until due payment of the secured claim. Upon the debtor’s discharge, the justification for the encumbrance and dispossession, its *causa*, falls away and therefore the original situation has to be re-established. A different result, of course, obtains if the debtor does not pay: then the creditor has to enforce his security. But again, the extent of this enforcement depends, by virtue of the principle of dependence, upon the amount and the conditions of the secured claim.

**522. Erosions of and exceptions to the principle of dependence** Although fundamental, the principle of dependence is no longer applied as strictly as it may have been intended earlier. Under the impact of the expansion of credit and the necessities of commercial needs, the principle has been softened by many exceptions and adapted to necessities. This erosion of the principle started early and continues to this day. Some modern codes expressly allow that security be granted not only for present claims, but also for future or conditional claims.<sup>123</sup> Germany and Italy expressly allow security for the balance of current accounts.<sup>124</sup> Judicial practice in many other countries has likewise admitted so-called omnibus pledges securing a sequence of claims.<sup>125</sup> – In addition to these erosions of

<sup>123</sup> Dutch CC art. 3:231 par. 1 first sent.; German CC § 1204 par. 2; Spain: Security Rights Act of Catalonia no. 19/2002 art. 13 par. 3.

<sup>124</sup> German Comm.C § 356 par. 1; Italy: CC art. 1828 par. 1 for current accounts at banks; for a credit account it is expressly said that a security is not extinguished by the mere fact that the account is no longer in debit for the customer (art. 1844 par. 1). Also French case law: Cass.civ. 24 June 1903, D.P. 1903.I. 472; Cour d’appel Douai 19 April 1956, D. 1956, 343.

<sup>125</sup> All-sums clauses are allowed according to the English report p. 12 and the Spanish report p. 11. All-sums clauses are also allowed to be secured by retention of title in England: *Bridge*, Personal

the principle of dependence, there are outright exceptions to it. This applies e. g. for the German retention of title and the security transfer of ownership.<sup>126</sup>

**523. Conclusion** The principle of dependence no longer constitutes an absolute rule but has become very flexible. Nevertheless, its core idea that in the end the security right is not absolutely and definitely transferred to the creditor, provided the debtor eventually pays, remains valid. As respects the impact of contract law, this “interference” is not caused by the contract; rather it is established by property law, to protect the interests of the debtor.

## (5.) Intra-European Cross Border Problems

**524. Introduction** In view of the diversity of the member states’ substantive rules on security rights one may expect major conflicts if assets validly encumbered in one member state are later moved into another member state. Such conflicts arise although all countries apply, in principle, a uniform conflicts rule, i. e. the *lex rei sitae*. This rule does not prevent conflicts but rather provokes them since it requires that the *lex situs* of each successive location must be applied. That means that a security validly created in country A is evaluated, after the encumbered asset has been brought to country B, by the property law of this latter state. In view of the divergencies existing between the member states it depends upon the regime of state B whether or not the foreign security right will be accepted as complying also with the domestic law of B. One may expect a positive result if the regime of B is more liberal than that of A; conversely, the result will be negative if the regime of B is stricter than that of A. These expectations are borne out by judicial practice. Due to two reasons, this general scheme does not, however, fully correspond to reality. First, a retention of title, being essentially a term of a contract of sale, is in practice often submitted to the law governing that contract, especially if the parties have agreed on the applicable law (generally or specifically with respect to the retention) and the chosen law is that of the seller’s country. The line between the scope of application of that law which covers primarily the contractual validity of the retention clause is drawn differently by courts and writers. The second reason is more apparent than real: If insolvency proceedings have been opened over the buyer and the sold goods are located in its country, then the local courts usually apply the *lex fori*; however, since the latter in these cases usually is identical with the *lex rei sitae* there is no real difference: Whether a security right is effective in bankruptcy essentially depends upon whether the substantive requirements have been fulfilled which the rules on contracts and property of the *lex fori concursus* establish as criteria to grant effects as against third persons.

**525. Recognition and non-recognition of security rights created in other member states.** The following survey of judicial practice in several member states demonstrates widely differing results from country to country. These differences can, however, be largely

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Property Law op.cit. 64; *Armour v Thyssen Edelstahlwerke AG*, [1991] 2 A.C. 339 (H.L.); and Germany: *Baur/Stürmer* loc.cit. 744-745.

<sup>126</sup> *Baur/Stürmer* loc.cit. 48 no. 43.

explained by looking at the internal security regime of each country. Recognition practice essentially reflects the status of the domestic law of each member state to which collateral is moved from another member state.

(a) **Austria:** Simple reservations of ownership which were validly created in Germany<sup>127</sup> and Italy<sup>128</sup> have been recognised. One decision of the Supreme Court gave the following reasons: “Since the retention of title is also recognised in Austria, it is not subject to form requirements nor to requirements of publicity, the change of situs of the sold goods is here irrelevant for purposes of the conflict of law.”<sup>129</sup> – By contrast, German security transfers of ownership (a non-possessory security right under German law) validly created in Germany have repeatedly been refused recognition in Austria because under Austrian law a security transfer of ownership, if not accompanied by transfer of possession, is not allowed.<sup>130</sup>

(b) **Denmark:** Simple retentions of title agreed upon between foreign suppliers and Danish buyers have not fared very well in Danish court practice. An English seller’s simple retention clause with respect to a machine sold for the Danish buyer’s enterprise and there installed was recognised in the buyer’s bankruptcy, although the (then in Denmark obligatory) down payment had not been made. This requirement was regarded as an aspect of the English law governing the sales contract.<sup>131</sup> By contrast, in several cases German or English sellers’ simple retentions of title in sales contracts with merchants or the seller’s Danish agent, implying a right to resell the goods, have been held ineffective in the (first) buyers’ bankruptcies – in accordance with Danish law.<sup>132</sup> Whether this consequence can be avoided if the foreign seller retakes “its” goods shortly before opening of bankruptcy proceedings over the Danish buyer is not yet clarified.<sup>133</sup> – A German security transfer of ownership was recognised in one older case.<sup>134</sup>

<sup>127</sup> S.Ct. 19 Jan. 1989, IPRE 3 (1988-1990) no. 97; S.Ct. 31 March 1989, *ibid.* no. 98; S.Ct. 29 May 1990, SZ 63 no. 85, *ibid.* no. 99.

<sup>128</sup> S.Ct. 28 March 2002, ÖBA 2002, 937 (implied recognition).

<sup>129</sup> S.Ct. 19 Jan. 1989, *supra* n. 1724.

<sup>130</sup> S.Ct. 14 Dec. 1983, JBl. 1984, 550; LG Linz 27 May 1986, IPRE 2 (1983-1987) no. 115. In a case in which a German bank used a security transfer of ownership of a lorry stationed in Austria the Austrian Supreme Court held the German bank liable for damages due to the fact that the bank insisted on its ownership and thereby caused considerable expenses to the plaintiff. The bank ought to have investigated whether it had become owner of the lorry under Austrian law: S.Ct. 28 March 2002, ÖBA 2002, 937 (approving note *Koziol*).

<sup>131</sup> S.Ct. 3 Nov. 1983, UfR 1984 A 8.

<sup>132</sup> S.Ct. 8 Feb. 1983, UfR 1983 A 311; Vestre Landsret 31 Jan. 1992, UfR 1992 A 373; Østre Landsret (ØL) 6 April 1998, UfR 1998 A 1073.

<sup>133</sup> In an older case, the retaking and return to Germany was held to “cure” the retention clause, S.Ct. 17 May 1977, UfR 1977 A 507; by contrast, ten years later the court allowed a claim for repayment of the purchase price against the German seller, although it had retaken the sold goods with the buyer’s express consent, S.Ct. 21 Aug. 1987, UfR 1987 A 766.

<sup>134</sup> In order to finance the purchase of a used car, a Danish citizen living in Germany asked a German bank for a loan; as security, ownership in the car was transferred to the bank. Later the Dane moved back to Denmark, reregistered the car and subsequently sold it to a small Danish firm which bought it in good faith. The German bank succeeded in reclaiming “its” car, ØL 27 March 1963, UfR 1963 A 704 (extract in J.D.I. (Clunet) 1965, 691).

(c) **France:** The former fundamental hostility of French courts against foreign non-possessory security rights<sup>135</sup> has today, in view of an increasing number of French legislative instruments for non-possessory security, given way to a more liberal attitude. Foreign simple retentions of title are today impliedly recognised in the French buyer's bankruptcy if the substantive and procedural requirements of French insolvency law have been observed by the foreign seller.<sup>136</sup> The extension of a German seller's retention clause into the products of the sold goods (textiles made from the seller's yarn) was not recognised, in keeping with French law which demands that, as a rule, the original goods must still be present.<sup>137</sup> – One French case dealt with an involved arrangement between two Dutch and a French company: The basic transaction was, in essence, a purely Dutch security transfer of ownership (hidden under a contract of sale of equipment to a bank combined with a rehire-purchase contract to the seller) between two Dutch companies. The Dutch hire-purchaser brought the material to France where a French creditor of that company sought to bring execution into the material. The Dutch owner's attempt to oppose that execution failed: the Dutch contract was analysed as being in reality a non-possessory security of a type unknown to French law and therefore void.<sup>138</sup> To some degree comparable is a later case reaching the opposite result: Leasing contract between two German companies about a machine for treating potatoes; lessee subleases machine to a French company which becomes bankrupt. Lessor's action for restitution of the machine is successful although the sub-leasing contract had not been registered, as prescribed by French law; the Supreme Court excused this by pointing out that there had been no leasing contract between the German lessor and the French sublessor.<sup>139</sup>

(d) **Germany:** German case law fully proves the thesis that security interests created in member states with stricter regimes are fully recognised in Germany if the encumbered assets are imported or otherwise brought to Germany which has an extremely liberal system of security rights. In some cases the effects of such foreign security rights have even been increased over the level which they had had in their country of origin! The general rule may be exemplified by several cases dealing with simple retentions of title created in Belgium, The Netherlands and Spain.<sup>140</sup> In the leading case, the Federal Supreme Court held in 1966 that a retention of title under Italian law, although valid

<sup>135</sup> Cf. Cass. 24 May 1933, J.D.I. (Clunet) 1935, 380; Cass. 8 July 1969, *ibidem* 1970, 916.

<sup>136</sup> Cf., e.g., Cass. 22 Dec. 1975, Bull. 1975 IV no. 313: the German seller had terminated the sales contract before the insolvency proceeding had been opened. Cf. also Cass. 5 March 1996, Bull. 1996 IV no. 73: successful claim for delivery of German seller's successor against French buyer's French lessee who was held to be in bad faith with respect to the buyer's entitlement to the goods since the lease contract mentioned the reservation of ownership (cf. note D. 2000 J. 74). Cass. 8 Jan. 2001 Rev.crit. d. i. p. 2002, 328 note *Bureau*, did not recognise an Italian seller's retention clause on the contractual level as not affecting those goods which the seller reclaimed.

<sup>137</sup> Cass. 8 Jan. 1991, J.D.I. (Clunet) 8 Jan. 1991, 993, IPRax 1992, 187 note *Hanisch*.

<sup>138</sup> Cass. 3 May 1973, Rev.crit. d. i. p. 1974, 100 with note *Mezger*, J.D.I. (Clunet) 1975, 74 with note *Fouchard*.

<sup>139</sup> Cass. 11 May 1982, Rev.crit. d. i. p. 1983, 450 with note *Khairallah*, D.S. 1983.J. 271 with note *Witz*.

<sup>140</sup> OLG Koblenz 23 Dec. 1988, IPRspr. 1988 no. 35 and LG Köln 24 March 1992, *ibid.* 1992 no. 73

only between the contracting parties, upon importation of the purchased machines into Germany became fully effective also against third persons since German law does not know merely “relative” ownership and the extension to full ownership complies with the intentions of the parties.<sup>141</sup> – The same liberality was also shown to other types of security rights. Thus a French “gage automobile” in a lorry was seized on a trip to Germany by a German creditor of the vehicle owner. The French type of non-possessory pledge was given the effects of a German security transfer of ownership which entitles the secured creditor to preferential satisfaction in the sale of the seized asset.<sup>142</sup> The same rule was later applied when an Italian luxury car had been brought to Germany and had here been sold to a German citizen. When the Italian bank which had financed the acquisition of the car by the Italian seller sought to enforce the mortgage created in Italy and there registered, this mortgage was also recognised as a non-possessory security to which the German rules on security transfer of ownership were applied.<sup>143</sup>

(e) **Italy:** Italian case law is in stark contrast to that of Germany, but in essence proves the general thesis as well since the domestic law is rather strict. The few cases that have been published are unanimous in refusing to recognise foreign simple retentions of title in goods moved to Italy. The stumbling block was the absence of a “data certa” in the contracts of sale, as required by Italian law to make a retention effective towards third persons.<sup>144</sup>

(f) **The Netherlands:** Since the recognition of foreign security rights indirectly depends on the domestic regime of security rights in the country of importation and Dutch substantive law in this area was changed considerably by adoption of the relevant parts of the new Dutch Civil Code in 1992, useful reference can here only be made to a few cases decided after 1991. An English retention of title was recognised by a first instance court.<sup>145</sup> On a German extended retention of title a remarkable decision was rendered by the Dutch Supreme Court: The German seller had sold chemical products to a Dutch buyer, had allowed resale and extended the retention clause into any proceeds arising from such a resale; neither the first nor the second buyer had paid their purchase prices

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(Belgium); OLG Koblenz 16 Jan. 1992, *ibid.* 1992 no. 72 (Netherlands); LG Hamburg 28 June 1978 (Spain). *ibid.* 1978 no. 42.

<sup>141</sup> BGH 2 Feb. 1966, BGHZ 45, 95, IPRspr. 1966/67 no. 54. This rule was also applied to an Italian reservation of title with an “all-sums” clause, OLG Hamm 13 July 1989, IPRspr. 1989 no. 76, as well as to a Spanish reservation of title, cf. LG Hamburg, preceding note.

<sup>142</sup> BGH 20 March 1963, BGHZ 39, 173, IPRspr. 1962/63 no. 60.

<sup>143</sup> BGH 11 March 1991, IPRspr. 1991 no. 71 (*sub* 1 d). The court denied the appellate court’s assumption that the German buyer had acquired unrestricted ownership in the car: buyers of foreign cars are expected to exercise particular circumspection (*sub* 2).

<sup>144</sup> Cass. 21 June 1974 no. 1860, Riv.dir.int.priv.proc. 1975, 335 (retention of title to Austrian lorry in transit; *data certa* necessary for the effectiveness of the security right); Corte d’appello Milano 6 April 1956, Foro it. 1957 I 1856 (German retention of title valid only between the parties since not mentioned in the vehicle documents, although a dated notarial document existed!); Trib. Latina 19 Feb. 1973, Giur.it. 1974 I 2, 421 (Greek retention of title in lorry in transit; the vehicle documents, though, designated the buyer as owner).

<sup>145</sup> President Rb. Amsterdam 30 July 1992, NIPR 1992 no. 381.

when the first buyer was declared bankrupt. The litigation between the German seller and the Dutch insolvency administrator was decided in favour of the seller although the Dutch prerequisite of a valid assignment, i. e. a notice to the account debtor, had not been made. The Supreme Court relied upon a European conflict rule, namely art. 12 par. 1 of the Rome Convention which submits the assignment of receivables to the law governing the assigned claim which in this case was German law which dispenses from notification of the account debtor.<sup>146</sup>

(g) **Spain:** As most other South European member states, Spain has a rather strict regime of security rights, and this is reflected in its treatment of encumbered assets crossing its frontiers from other member states. In a remarkable decision demonstrating the strictness of the Spanish approach, an appellate court disregarded a German simple retention of title in a German registered bus passing through Spain on the ground that the Spanish requirements for publicity of the retention clause had not been complied with.<sup>147</sup> One may ask whether a foreign registered bus circulating in a country has a genuine *situs* so as to justify the intervention of the local law under the conflicts rule of the *lex rei sitae*. It is moreover open to doubt, whether and where to register since neither creditor nor debtor had a place of business in Spain.

(h) **Sweden:** The Supreme Court had to pass on two cases in which German suppliers had sold machines and carpets, respectively, under simple reservations of title to Swedish merchants for resale. In both cases, the German sellers reclaimed the goods from the respective insolvency administrators of the Swedish buyers but limited their claim to those goods that had not yet been resold by the buyers. In its decision of 1978 the Supreme Court denied the claim according to Swedish law, whereas in the earlier case of 1932 the claim was allowed, apparently because the defendant insolvency administrator had not properly resisted the claim.<sup>148</sup> – Two other decisions of the Supreme Court dealt with automobiles that had been temporarily brought to Sweden where public authorities laid hands on them on differing grounds. Both cars, registered in Germany, had there been transferred by a security transfer of ownership to creditors to secure them for loans granted to the person possessing and using the cars. In one case, the secured owner was successful,<sup>149</sup> while in the other case where the car had been used for smuggling and illegally selling drugs in Sweden the car was expropriated in disregard of the owner's rights.<sup>150</sup>

(i) **England:** Also some English cases confirm the strict application of English law to foreign reservations of title after the sold goods have been imported to England. While no problems seem to have arisen with simple reservations of ownership, the various forms

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<sup>146</sup> H.R. 16 May 1997, NJ. 1998 no. 585.

<sup>147</sup> Audiencia Provincial de Barcelona 13 Sept. 1989, Rev.Esp.Der.Int. 42 (1990) 644 with note *Sanchez Lorenzo*. The court validated an execution brought by a Spanish creditor of the German bus company and refused the seller's claim to its property.

<sup>148</sup> S.Ct. 31 Oct. 1978, NJA 1978 I no. 114; S.Ct. 27 April 1932, NJA 1932 I no. 84.

<sup>149</sup> S.Ct. 1 Oct. 1984, NJA 1984 I no. 125.

<sup>150</sup> S.Ct. 18 Oct. 1968, NJA 1968 I no. 63 in the criminal proceedings, confirmed after sale of the car by S.Ct. 17 May 1972, NJA 1972 I no. 34.

of extension have, generally speaking, been allowed or disallowed according to English standards. Thus a German retention clause providing for a security for all sums of the buyer's indebtedness to the seller was recognised by the House of Lords.<sup>151</sup> By contrast, after initial allowance, extensions of title retention into the proceeds of the sold merchandise are now no longer recognised, unless the security assignment of the first buyer's claim for the purchase against the sub-buyers is registered in the company register. The English importer assigned its claims to an English factoring company which duly notified the debtors of the assigned claims. The German company's action against the factoring company for repayment of the customers' payments was unsuccessful.<sup>152</sup> – By contrast, an Irish floating charge was recognised in England.<sup>153</sup>

**526. Conclusions and reactions of stakeholders** The preceding survey of the practice of recognition and non-recognition of security rights in goods imported from other member states demonstrates the great differences that exist on this issue from member state to member state. These differences reflect, as can be expected, the liberality or illiberality of the respective import country's domestic system of security rights. The variations are in keeping with the basic principle of the *lex rei sitae*, the fundamental conflict rule in the area of property rights. This conflicts rule is confirmed and reinforced by the "basic" rule for border-crossing insolvencies, *i. e.* to apply the law of the insolvency proceeding (*lex fori concursus*) to real rights of security if the encumbered asset is located in the member state in which the proceeding has been opened.<sup>154</sup> Attention must, however, be drawn to one typical fact situation where the strict application of the *lex rei sitae* does not appear to be justified. Reference is made to the several cases that have occurred in various member states where local property law was applied to foreign motor vehicles in transit.<sup>155</sup> One cannot expect foreign holders of security rights in foreign-registered cars to comply with any requirements of form or publicity existing in some country which the vehicle may be crossing; the less so since probably there will rarely be an office of registration competent to effect such a registration for a foreign car passing through the country. In such cases it should be held that a foreign motor vehicle in transit does not acquire a "situs" and is therefore immune from the application of the *lex rei sitae*.<sup>156</sup>

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<sup>151</sup> *Armour v Thyssen Edelstahlwerke AG*, [1991] A.C. 339 (H.L.).

<sup>152</sup> *E. Pfeiffer Weinkellerei – Weineinkauf G.m.b.H. & Co. v Arbuthnot Factors, Ltd.*, [1988] 1 W.L.R. 150 (Q.B.). The court distinguished this case from the earlier decision on a Dutch reservation of title with a comparable extension clause: *Aluminium Industrie B.V. v Romalpa Aluminium, Ltd.*, [1976] 2 All ER. 552 (C.A.), where the seller's claim succeeded. But this case is generally construed very narrowly.

<sup>153</sup> *Cretanor Maritime Co. Ltd. v Irish Marine Management Ltd.*, [1978] 1 W.L.R. 966, 977-978 per Lord Buckley (C.A.).

<sup>154</sup> EU Insolvency Regulation no. 1346/2000 of 29 May 2000 (O.J. 2000 L 161 p. 1), especially art. 4 lit. i) and *arg. e. contrario* art. 5 and 7.

<sup>155</sup> See *supra* cases mentioned in notes 141, 143, 146, 148 and 149.

<sup>156</sup> An exception is, of course, indicated where a car or a lorry has been abused for criminal acts, such as smuggling or transportation of drugs; cf. *supra* notes 143 and 149.

**527. Securing credit on assets located in another member state** For the decision to grant credit and to require security for it, the general regime of proprietary security rights in another member state is less relevant than the particular circumstances of each case, especially the personal credit rating of the debtor. As far as security is concerned, primary importance is attached to both the factual and the legal value of the specific asset offered as security by the debtor. Generally speaking, movables located in the debtor's country are regarded with great scepticism, inter alia, if formalities, such as registration or notarial instruments, have to be observed. Also the necessary supervision of such assets is difficult and expensive. Pledges of securities held by foreign banks or of participations in foreign companies as well as real estate mortgages are regarded more favourably. Global assignments for security against foreign account debtors of foreign debtors are rarely accepted; it is different in the case of German debtors with international business activities. Many banks refuse to grant any credits against security in assets located abroad.

Instead of proprietary security, creditors may require personal security, such as bank guarantees, letters of credit, export credit insurance, or bills of exchange. However, most of these instruments are clearly more expensive than domestic security devices due to the additional bank charges, because of expensive legal advice from a foreign lawyer, expensive translations and formalities. Major exporters nevertheless will insist on them, whereas small and medium enterprises do so less frequently. An experienced German practitioner reported that "not infrequently" his clients in such cases refrained from entering in such deals. One major German enterprise maintains that, although initially more expensive, this is overcompensated in the long run since enforcement of these personal security rights can be achieved faster and less expensively than that of proprietary security rights. An ultimate alternative, if neither proprietary nor personal security rights are feasible, is to modify payment terms, especially by demanding advance payment(s). These "modalities" are more expensive for the foreign business partner.

**528. Security rights in border-crossing transactions** Without mentioning the relevant conflict rule of the *lex rei sitae*, enterprises know from experience that they must adapt to the local law of the place of destination if they want to maintain a security right for an export transaction. To a large degree the problems are the same as those arising if a security right is to be established in assets already located in another member state (cf. *supra* no. 527). However, in the case of export transactions the additional desire and expectation arises to preserve the continuity with a domestic security interest validly created in the exporter's home country. In view of the great liberality of the German national regime of security rights, it is not amazing that especially German firms and practitioners experience special difficulties in their export transactions. One smaller German firm assumes that an adaptation of a German security right to the importer's legal regime occurs automatically so that no action needs to be taken – unless it is clear that the German security right will not be recognised at all. Another firm asserts that it relies on its German security right; the risk of its invalidity abroad is assumed. Other German firms mention that especially security transfers of ownership and also retentions of title usually are not valid in other member states. Nevertheless, retentions of title are agreed, especially since German export credit insurers demand this security from their clients. In cases of security assignments, one firm always notifies the account debtor(s),

even if that may be unnecessary under the governing law, to be on the safe side. Another firm qualifies by mentioning that notification is waived only if that would run counter to “special reasons of business policy”.

**529. Shareholders’ ideas for remedying the present difficulties** The fact that German exporters and financiers, due to the liberality of German domestic law on security rights (cf. *supra* no. 528), are more negatively affected than stakeholders in other member countries may explain that most of the ideas and proposals comes from German trade and banking associations. A major German banking association thinks that the problem of loss of security right in intra-EU border-crossing transactions should be solved by introducing the principle of mutual recognition of security rights. By contrast, most other stakeholders think that a solution can only be found by harmonising the relevant substantive rules. Three Austrian and German trade and banking associations plead for a harmonisation or unification of security rights. It is not always quite clear whether a harmonisation or unification of the national security regimes is implied or the creation of a uniform security right on the European level is desired the proprietary effects would be recognised in the member states. One proposal clearly goes into the latter direction, the others more probably have the first alternative in mind. In particular, retention of title and the security assignment of receivables are mentioned as primary objects of harmonisation/unification. One voice mentions the extended reservation of title (in the broad meaning of this term, as understood in Germany). A German practitioner writes: “A unification of proprietary security rights for exported goods, on the basis of German law or at least in the direction of the German rules, would be a step for the realisation of the Common Market, with considerable importance for German exporters.” On the other hand, a major German banking association strictly opposes any unification of the regimes on security rights, especially if the method of maximum harmonisation were chosen, as in the recent draft for a Directive on consumer credit. National practices that have proven their value threaten to be undermined thereby. More useful would be a comprehensive comparative presentation of the national rules.

## IV. Contractual Security Rights in Immoveables (Mortgage) and Contract Law\*

### (1.) Creation of Mortgages

**530. Creditor’s participation in the contract to create a mortgage** In most member states no particular form is required for the creditor’s consent; the signature of the owner-debtor is sufficient. However, in France, Belgium and The Netherlands, the creditor has to participate in the creation of the mortgage.

**531. Effects of the contract to create a mortgage** In England, a contract to create a legal mortgage, like other contracts to create legal estates, gives an equitable interest to any party entitled to specific performance. But an equitable mortgage of this type is more

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than a mere preliminary to a legal mortgage: equity treats it as an actual mortgage. In many cases the execution of a legal mortgage is never intended and never carried out. The necessary legal formalities may be too troublesome or expensive for the parties, in particular if only a short-term loan is contemplated. Since 1989, the agreement is of no legal effect if it is not specifically made in writing and signed by both parties. Since the legal formalities for the creation and registration of mortgages are troublesome and expensive for the parties, it is not infrequent for a creditor to be content with a *promesse d'hypothèque*, reserving the decision whether to create a mortgage to a later date.<sup>157</sup> This agreement does not create a mortgage, but an obligation on the part of the debtor to create a mortgage. If he does not perform his obligation, the creditor cannot obtain a judgment producing the effect of the mortgage but has a right to damages.<sup>158</sup> In Belgian law, the debtor refusing to perform his obligation loses the benefit of the term;<sup>159</sup> more importantly, since 1981 the judge can impose on the debtor a fine for every day of delay in performing his obligation.<sup>160</sup> The possibility for the judge to impose an *astreinte* is discussed also in France.<sup>161</sup>

**532. Two systems of creation** In most member states, mortgages do not arise before registration.<sup>162</sup> By contrast, in France and Belgium mortgages come into existence at the moment when the instrument is drawn by the notary. However, the subsequent entry into the mortgage register gives the mortgage legal effect in regard to third parties and determines the specific rank of the mortgage in relation to other charges. Before registration, the mortgage has no legal effect in regard to third parties, even if they know of the mortgage. «*Une hypothèque inopposable aux tiers est un fantôme d'hypothèque*».<sup>163</sup> On

<sup>157</sup> Cf. T'Kint, Sûretés (1991) loc.cit. 309: «La promesse d'hypothèque se rencontre lorsque le débiteur est pressé d'obtenir un prêt sans attendre l'accomplissement des formalités requises pour la constitution de l'hypothèque qui doit en garantir le remboursement. Plus récemment, s'est développée une autre pratique. Le créancier accepte de ne pas exiger immédiatement constitution de l'hypothèque et se contente d'une simple promesse du débiteur de consentir celle-ci à première demande. Le débiteur évite ainsi les formalités et les frais (...) de la constitution de la sûreté (...) Il est même possible que l'hypothèque ne soit jamais constituée, si la solvabilité du débiteur n'inspire guère de crainte au créancier et si la dette est ponctuellement acquittée». See also Masquelin, Law of land registration and mortgages in Belgium, in *The third real estate forum: Mortgage Lending in Europe*, <http://www.eurojurislawjournal.net/Hypothekenrecht/Berichte.html>.

<sup>158</sup> See Cabrillac/Mouly, Droit des sûretés<sup>2</sup> (1993) no. 789; Simler/Delebecque, Droit civil. Les sûretés, La publicité foncière<sup>3</sup> (2000) 302; De Page, Traité élémentaire de droit civil belge VII (1957) 685; T'Kint, Sûretés (1991) 308 ss.

<sup>159</sup> De Page loc.cit. 664 s.

<sup>160</sup> Code judiciaire art. 1385 bis; cf. T'Kint loc.cit. 310.

<sup>161</sup> See e.g. Cabrillac/Mouly loc.cit. no. 789.

<sup>162</sup> Cf. the Civil Codes of Italy (art. 2808), Spain (art. 1875), Germany (§ 873), the Netherlands (art. 3:89, 3:98, 3:260), Austria (§ 451 par. 1, Land Registration Act § 13-18), Greece (art. 1257 ss.), Portugal (Arts. 686 s.; Land Registration Act, art. 6); Sweden; Finland (Real Property Act, ch. 16-16) and Scotland (Land Registration (Scotland) Act 1979; *Bank of Scotland v Hutchison, Main & Co.*, 1914 S.C. (H.L.) 1.

the other hand, even where the mortgage does not exist before registration, after the agreement of the parties the creditor has a personal right against the mortgagor (who must not hinder the registration of the mortgage or lessen its value). The divergence is thus more theoretical than practical.

**533. The English system** In England, a deed is required for the creation of legal mortgages of a freehold or leasehold estate.<sup>164</sup> Registration is not required for validity. However, if a legal mortgage is not registered its enforceability against third parties is gravely effected. Within the so-called *unregistered* land system, a legal mortgage not protected by a deposit of documents of title (a *puisne mortgage*) must be registered as a class C(i) land charge in the register of land charges, otherwise it is void against a subsequent purchaser of the land; within the *registered* land system, any legal mortgage whose priority is not protected as a registered charge is postponed to the interest of a disponee for valuable consideration.<sup>165</sup> The fundamental objectives of the registered land system, now reinforced in the Land Registration Act 2002, are that the register of title (accessible online) be a largely complete and accurate reflection of the effective title to the land at any given time and registration confer title rather than merely record a title already created. Moreover, electronic conveyancing eliminates the problems arising due to intervals of time between transaction and registration. This is true for mortgages as it is for dispositions of registered estates generally. However, beyond changes in the form of conveyancing, the Act does not imply radical changes in mortgage law.

## (2.) Does the Invalidity of the Agreement Affect the Mortgage?

**534. Invalidating effects between the parties** The interdependence between the validity of the agreement and the validity of the mortgage is strictly connected with the issue of the accessoriness of the mortgage itself. In most legal systems, where the mortgage is accessory to the secured claim, the invalidity of the agreement affects the security right created by that agreement. The invalidity of the agreement has the effect of invalidating the claim created by that agreement, and the accessory nature of the security referred to above will imply that no mortgage can survive the secured claim. In particular, the Dutch Civil Code provides that a valid contract is an essential requirement to create a valid mortgage, so that the avoidance of the contract produces the avoidance of the

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<sup>163</sup> *Malaurie/Aynés*, Cours de droit civil, IX, Les sûretés<sup>10</sup> (2000) 273.

<sup>164</sup> See Law of Property Act 1925 (LPA), ss. 85(1) and 86(1) for charges by way of legal mortgage). A legal mortgage by demise for a term of years absolute (which is now only possible for estates in the unregistered land system: see Land Registration Act 2002 (LRA), s. 23(1)) must likewise be made by deed since a legal lease (unless for less than three years and at a market rent) cannot be granted otherwise: LPA, s. 52(1).

<sup>165</sup> For unregistered land, see the Land Charges Act 1972, s. 2(4)(i). For registered land, see the Land Registration Act 2002, s. 29 (1), but note that exceptionally a legal mortgage may nonetheless be protected by entry of a notice in the register or (under Sched. 3, para. (2)) in certain circumstances if the mortgagee is in actual occupation of the land.

mortgage.<sup>166</sup> Similarly, for Spanish law it has been stated that if the contract is avoided or dissolved by the parties, the mortgage shares the same fate.<sup>167</sup> Also in Italy and in France, the accessory nature of the mortgage implies that when the underlying claim disappears, the mortgage will disappear as well. Since the invalidity of the agreement extinguishes the secured claim, it will also extinguish the security interest. It is important to underline that in both countries it is not necessary, in order to extinguish the mortgage, to cancel the registration in the land register. Nevertheless, since the entry in the register may constitute an obstacle to future transactions involving the immovable, the law imposes on the creditor the duty to accept the cancellation of the mortgage.<sup>168</sup> In English law, if the transaction by which the mortgage is created is defective, the security right will also be affected. If the mortgage has been registered, the mortgage can be cancelled through rectification of the register. In case of a voidable title, rectification shall not prejudice third parties in good faith, without notice of the facts giving rise to the voidability.

**535. No invalidating effect between the parties** Under Scots law, the validity of the agreement to create a security is necessary in order to enforce the creditor's personal right to have the security registered. If the contract to create the security is void, neither the debtor nor the creditor will have the right to demand registration of the security right. If the contract is voidable, registration can still be enforced by the creditor until the contract is avoided. Scots law thus distinguishes between a voidable contract and a voidable title. Nevertheless, once the security has been registered, the abstract system of registration generally insulates the antecedent invalid agreement to create a security. When the agreement is void due to lack of consent or lack of capacity, yet the creditor has obtained the registration it is necessary to remove the registration in order to invalidate the mortgage. However, the formalities and the procedure to cancel the registration are problematic and troublesome; unless all the parties agree, an action before a court is probably necessary; however, it is possible to register a notice that litigation is pending; this shall make the consequences of the action retroactive.

**536. Effects in relation to third parties** In most other legal systems, the contractual nature of the mortgage generally implies that the interdependence between mortgage and agreement also affects third parties who have acquired the secured claim from the original creditor. When the transfer of the claim and of the relevant mortgage requires an annotation in the land register on the margin of the original entry (e. g.: Italy, France and Spain), the nullity of the original entry will extend to the annotation. In general, where the mortgage is strictly accessory, the different effects of the different kinds of invalidity of the agreement will have different consequences for the validity of the mortgage as far as third parties are concerned. In particular, it is necessary to distinguish between cases of retroactive invalidity and cases of invalidity *ex nunc*. When the invalidity of the agreement does not produce retroactive effects, the security interest acquired by a third party before the declaration of invalidity of the original agreement will not be affected. Therefore, from this perspective, the harmonisation of the substantive rules on

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<sup>166</sup> CC Arts. 3:84, 3:98 and 3:260.

<sup>167</sup> Tribunal Supremo 26th March 1999, Aranzadi, RJ 1999/1854.

<sup>168</sup> Cf. for Italy Cass. 26th July 1994, no. 6958, Foro it. 1995 I 851.

the invalidity of contracts and its consequences may play an important role with regard to the issue which impact the invalidity of the underlying agreement has on the security interest.

**537. The special situation under German law** Under German law it is necessary to distinguish between the accessory ordinary mortgage (*Hypothek*) and the non-accessory land charge (*Grundschild* which is used in practice mostly in the form of the *Sicherungsgrundschild*). In the first case, the rules applied are very similar to those already outlined for other legal systems, such as those of France or Italy, where the security is strictly accessory to a principal obligation. In particular, the invalidity of the agreement can affect the *Hypothek* according to CC § 1137, which establishes the exceptions which the owner of the charged property can raise against the secured creditor. That provision is based upon the “split approach” already mentioned before in other contexts (*supra* II no. 16 and III no. 34) which separates the level of the law of obligations from that of the law of property (proprietary level). CC § 1137 concerns the level of the proprietary relationship between the parties, grounded on the mortgage (and not the personal one, grounded on the contract) and allows the owner of the charged property to raise *all* the pleas the debtor can raise against the creditor who is enforcing his security. It is clear that this rule – which combines the contractual and the proprietary level of the relationship – is justified by the strict accessorial nature of the *Hypothek*.<sup>169</sup> In this wide range of exceptions are included, among others, the exception of unjust enrichment which operates exactly in case of invalidity of the contract underlying the mortgage. By contrast, different rules apply to the *Grundschild*. The abstract character of this security right as well as the possibility of creation directly by (and in favour of) the owner of the property implies – in principle – that the strict separation between the *Grundschild* and the agreement, viz. between property law and contract law is preserved.<sup>170</sup> This means that, as a general rule, the invalidity of the contract underlying the security right does not affect the validity of the *Grundschild*. This principle is supported by the opinion that § 1137 finds no application to the *Grundschild*.<sup>171</sup> In practice, the *Grundschild* is used in the form of the so-called *Sicherungsgrundschild*. That is, the parties establish in a contract the claims which have to be secured by the *Grundschild*, as well as the ways by which the creditor can enforce his security (e. g., only when the secured debt is due and the debtor is in default; or also in case of breach by the debtor of some accessory obligations arising from the contract, etc.). Any breach of contract will merely entail a contractual liability. Even the invalidity of the security agreement cannot affect the validity of the *Grundschild*. If the creditor enforces his security notwithstanding the voidness of the security agreement, this will be relevant merely on the level of contract law as a breach of contract.<sup>172</sup>

<sup>169</sup> Staudinger (-Wolfsteiner), Kommentar zum Bürgerlichen Gesetzbuch III<sup>12</sup> (2002) § 1137 no. 4.

<sup>170</sup> Staudinger (-Wolfsteiner) loc.cit. § 1137 no. 21.

<sup>171</sup> As to the split approach of German law and the limitations and exceptions to its strict application see, e. g., Drobnig, *Transfer or Property*, in: *Towards a European Civil Code*<sup>2</sup> (1998) 505 ss., 507 ss.; Baur/Stürmer loc.cit. 47 ss.

<sup>172</sup> It is worth saying that German legal scholars uphold the application of CC § 1137 (not to the

**538. Similar solutions in Sweden and Finland** In Sweden and Finland we can find a relationship between (in)validity of the credit and (in)validity of the security interest similar to that we have described above for the German *Grundschild*. In these two countries, a mortgage certificate can be issued which insulates the mortgage from the existence of a claim. The invalidity of the contract to create a mortgage does not affect the validity of the mortgage, while it affects the validity of the lien. The lien indeed implies a valid contract giving rise to a valid claim; if the latter is avoided, the former is also void. The owner may well enter into a new valid agreement giving rise to a new valid claim and still secure this new credit using the original mortgage certificate and its original rank.

### (3.) Dependence of the Security on the Secured Claim

**539. The principle of dependence: a security right is only accessory to the secured claim** In most states, the mortgage is strictly accessory to the secured claim. This means that the coming into being of the mortgage, its scope and discharge depend on the existence and respective actual scope of the secured claim. In Germany one of the forms of security interests in land, the *Hypothek* is also accessory to the underlying secured claim. It is not conditioned upon the existence of a personal claim of the creditor against the debtor. By contrast, the *Grundschild* is independent of the existence of a personal claim. Consequently, the *Grundschild* can already be created before the granting of a credit or to a higher amount than that of the actual claim. German law empowers an owner to create a *Grundschild* for himself on his own property; in this way an owner may save a particular position in the rank of encumbrances for subsequent utilization. – Swedish and Finnish law are in this regard not dissimilar from German law. Upon the registered owner's application mortgages are registered and certified by a mortgage certificate which is handed to the owner. The mortgage certificate can be issued without the existence of a secured claim. The legal effects of a registered mortgage commence on the day the mortgage is applied for. This date also determines the rank of the mortgage.

**540. Erosion of the principle of dependence** In practice, the principle of accessoriness of mortgage and secured claim has been eroded by extending the kind of secured claims beyond that of a claim for a presently existing fixed sum of money. Already the French Civil Code expressly mentions the possibility of creating a mortgage to secure conditional or future debts.<sup>173</sup> The same is true for Greece, Spain and The Netherlands.<sup>174</sup> Also in Belgium it is possible to create a security interest to secure future or conditional debts; this was accepted by case law<sup>175</sup> and is now expressly recognised in the Mortgage Credit Act of 1995. According to art. 51 *bis* of this Act, a mortgage may be granted as security for future debts if the secured obligation is determined or determinable at the

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*Grundschild* but) to the *Sicherungsgrundschild*: Staudinger (-Wolfsteiner) loc.cit. Introduction to § 1191 ff., no. 87.

<sup>173</sup> CC art. 2148 par. 3 no. 4.

<sup>174</sup> Greek CC art. 1258; Spanish Ley Hipotecaria art. 142; Dutch CC art. 3:231 par. 2.

<sup>175</sup> See *T'Kint* loc.cit. 283.

time when the mortgage is granted. It is assumed that this condition is met when the contract indicates the frame of reference within which the debts should originate (e. g. the business relationship between a bank and a client). Since the enactment of the new statute, the formula “*pour toutes sommes*” is becoming a kind of *clause de style* in the mortgage agreements. In England, the mortgage has been defined as “a security created by contract for the payment of a debt already due or to become due, or of a present or future advance”.<sup>176</sup> In Scotland “debt” is defined as “any obligation due, or which will or may become due, to repay or pay money...”; “obligation due or will or may become due” refers to future credits or conditional credits as for instance the conditional liability of a guarantor or cautioner (surety) who has guaranteed payment of a debt. This means that the subject of the security will also secure debt not yet in existence and which will only arise at a future date.<sup>177</sup> A specific commercial phenomenon of future claims are current accounts and open credits; mortgages for securing them are expressly allowed in France, Italy, England, Scotland and Spain.<sup>178</sup> Other countries allow mortgages securing a maximum amount which clearly comprise security also for future indebtedness.<sup>179</sup>

**541. Dependence and transfer of secured claim or mortgage** The accessory character of the mortgage manifests itself in the principle that any transfer of the secured claim, whether by assignment or negotiation, ordinarily transfers also the mortgage. The security follows the claim;<sup>180</sup> transfer of the mortgage, however, is effective only upon a corresponding entry in the (land) register. Practically, however, if the transfer is not recorded the accessoriness is broken: the credit is transferred but the transferee cannot use the mortgage. In financial practice, it is not unusual that the original creditor transfers part of the credit to other banks, without recording the transfer, and thus remaining the sole mortgagee, acting as a fiduciary of the other creditors. In Scotland, legislation provides for the transfer of the secured credit, in whole or in part, to a third party.<sup>181</sup> For the transfer two forms are provided in Schedule 4. In form A the assignment is contained in a separate document and in Form B it is endorsed on the standard security. Once the assignation is recorded, the security vests in the assignee as if it had originally been granted in his/her favour. The advantage of an assignation over a discharge is that an assignation maintains the ranking of the original creditor whereas a

<sup>176</sup> Coote, *Treatise on the Law of Mortgages*, (1927), i, 6.

<sup>177</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s. 9 (8) (c).

<sup>178</sup> France: Cass.civ. 21 November 1849, D.P. 1849 I 275; Italian CC art. 1844 par. 1 provides expressly that the security is not extinguished by the fact that the secured indebtedness temporarily amounts to zero; England and Wales: see for instance *Hopkinson v. Rolt*, (1861) 9 H.L.C. 514; *Florence Deeley v. Lloyds Bank, Limited*, [1912] A.C. 756 (H.L.); Scotland: cf. preceding footnote; Spain: Ley Hipotecaria art. 153 requiring, however, that the maximum sum and the duration must be fixed.

<sup>179</sup> German CC § 1190; Austrian Supreme Court 30 October 1985, SZ 58 no. 159 p. 755. The court requires that the legal ground be clearly indicated but regards a global credit agreement as sufficient (p. 759).

<sup>180</sup> French CC art. 1692; German CC §§ 401 and § 1153 par. 1; Greek CC art. 458; Italian CC art. 1263 par. 1; Spanish CC art. 1528 and Ley Hipotecaria art. 149.

<sup>181</sup> Conveyancing and Feudal Reform (Scotland) Act 1970, s. 14.

discharge necessitates a fresh security with a new ranking. – In Austria, the mortgage is not automatically transferred to the acquirer upon assignment of the claim; according to the prevailing opinion it requires an act by which the original creditor agrees to its transfer to the new creditor, and an entry in the land register; if the parties transfer only the credit, the mortgage ceases to exist. Theoretically, a contractual transfer of the security right only is not consistent with the accessory character of mortgage; however, a mortgagee can assign the rank of her mortgage to another mortgagee (lower in rank).<sup>182</sup> In The Netherlands the Civil Code expressly regulates the change of ranking.<sup>183</sup>

**542. Dependence and transfer of mortgage document** In several of the legal systems recognizing the accessory character of the mortgage it is possible to secure with a mortgage a credit incorporated in an abstract document. In this case, the rules concerning the transfer of the security are those regulating the transfer of the document, and no register formalities are required.<sup>184</sup> Less negotiable, but at least facilitating transferability of mortgages are public documents or certificates evidencing the mortgage. In Germany, by a written assignment and delivery of the certificate the claim secured by the mortgage as well as the mortgage itself is transferred. If the assignment is notarized the transferee is entitled to the same position as if the transfer were registered. The debtor cannot pay with liberating effect unless he pays to the holder of the certificate.<sup>185</sup> In Sweden and Finland the creditor may convey the mortgage certificate only if at the same time he transfers the debt. If the creditor has only handed over the mortgage certificate to the third party and not transferred the debt, this party has no lien on the real property. On the other hand, the creditor must hand over the mortgage certificate to the third party, if the parties intend to transfer also the security right to the third party and not only the debt. In England, it is provided that a deed executed by a mortgagee purporting to transfer a mortgage, or the benefit thereof, passes to the transferee the right to the “mortgage money” or the unpaid part thereof.<sup>186</sup>

#### (4.) Scope of Freedom of Contract

**543. Various meanings of freedom of contract** Freedom of contract can be viewed in two different perspectives. The first refers to the capacity of individual autonomy to create a legal relationship or a legal effect. The second refers to the existing contractual autonomy to choose between different formal arrangements to produce the same economic results. The possibility for private autonomy to create the specific legal effect of a security right on immovables is excluded in all the European legal systems; in these systems a mortgage must be registered in order to be valid for all purposes. An inherent character of the public register is that only acts with a specific form can be admitted and, consequently, the freedom to create a new security right by the use of a standard form is

<sup>182</sup> Cf. French CC art. 2149; Italian CC art. 2843.

<sup>183</sup> CC art. 3:262 par. 2.

<sup>184</sup> See, e.g., German CC §§ 1187-1189; Italian CC art. 2831.

<sup>185</sup> CC § 1157.

<sup>186</sup> Law of Property Act, 1925 s. 114.

irreconcilable with the system of registration of land charges. This is true also with respect to the floating charges in the British experience. Of course, freedom of contract can have a special relevance in those European legal systems that confer a binding effect upon a land charge before its registration. In the case law, however, it is unclear, whether this applies only to transactions aiming at creating a valid mortgage, or whether transactions creating a new land charge, not included among the existing real rights, can be considered binding between the parties. In France and Belgium the validity *inter partes* of a mortgage before registration is limited to a valid mortgage, while transactions aiming at creating other atypical charges are void. In England the validity in equity of an agreement to create a land charge is not foreseen. In any case it must be pointed out that a land charge having no effect in regard to third parties is merely a “*fantôme d’hypothèque*”. In order to preserve the role of the traditional devices legal systems can follow two ways: the first is forbidding the use of alternative legal arrangements, the second is establishing the complete structure of the traditional devices (with regard to private but also to administrative and fiscal law) so as to make the alternative devices economically unattractive. In France mortgage law is considered to involve public order;<sup>187</sup> consequently the use of alternative devices to reach the same result is regarded as highly suspect. In Italy the prohibition of “*lex commissoria*” makes any alternative tool very risky, while the mortgage is free from any risk in this regard. Thus, the extension of general principles of freedom of contract can have an impact on the market of mortgages, especially where the use of alternative legal arrangements is now inhibited by legal restraints.

### (5.) Effect of Debtor’s Performance on the Security

**544. The effect of dependence: the principle** The accessory character of the mortgage manifests itself in the principle that the extinction of the secured claim concomitantly extinguishes the mortgage. Thus in France,<sup>188</sup> Belgium,<sup>189</sup> Greece,<sup>190</sup> Italy,<sup>191</sup> The Netherlands<sup>192</sup> and Scotland payment by the debtor extinguishes the mortgage. In England, the borrower has an inviolable right, on repaying the loan, to redeem the security. The effect of redemption is to discharge the mortgage and leave the property free from encumbrances. “A security interest cannot exist without there being an obligation whose performance it is meant to ensure: once the obligation ends (...) the security interest dies”.<sup>193</sup>

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<sup>187</sup> Cp. CC art. 2115.

<sup>188</sup> See for instance *Cabrilac/Mouly* loc.cit. no. 863; Cass. 23 January 1973, D. 1973, 427.

<sup>189</sup> See *T’Kint* loc.cit. 332; Loi hypothécaire art. 108 no. 1.

<sup>190</sup> CC art. 1317, 1320.

<sup>191</sup> CC art. 2878: “Mortgages are extinguished: ... 3) by the extinguishment of the obligation”.

<sup>192</sup> CC art. 3:7: an accessory right is a right that is connected to another right in such a way that it cannot exist without that other right.

<sup>193</sup> *Lawson/Rudden* loc.cit. 127.

**545. Exceptions** Austrian law recognizes an important exception to the principle of dependence. According to CC § 469 sent. 3-5 the mortgage is not cancelled through the redemption of the debt. It continues to exist until “the debt is cancelled from the official books”. The mortgagor will therefore demand the issue of an acknowledgement of receipt<sup>194</sup> and have the encumbrance extinguished from the land register. Should he fail to do so, the entry of the mortgage remains in the land register. Instead of applying for cancellation, the owner may use the former mortgage to secure a new debt. However, if another contractual mortgage is registered in a rank below or at the same rank as the mortgage, the owner can only dispose over the “naked” mortgage if the owner has contractually reserved the power of disposition vis-à-vis that other mortgagee and this reservation is registered with the “naked” mortgage.<sup>195</sup> In Germany a *Hypothek* or a *Grundschuld* is converted after payment into an “owner’s *Grundschuld*” (*Eigentümergegrundschuld*),<sup>196</sup> thus preventing the moving up of subordinate encumbrancers. This *Grundschuld* can be used for the securing of new credits. Also in Sweden and Finland payment does not extinguish the mortgage. Once the claim for which the mortgage certificate was handed over and for which the mortgage was created is paid, the certificate returns to the owner; he may hand it over to a new creditor who thus obtains a mortgage with the original rank.

## (6.) Enforcement of Security

**546. General rule: judicial procedure** In all member states, the enforcement of mortgages is entrusted to the courts. In the present context it is not necessary to go into any details since obviously contractual elements are virtually eliminated. More relevant is a modern trend to be noticed in many countries to introduce some private initiative or, where it already exists, to broaden its scope.

**547. Contractual elements in enforcement** Contract clauses on private forms of enforcement of a mortgage that have been agreed upon before maturity of the secured claim are void in most countries.<sup>197</sup> *E contrario*, they can be regarded as valid if agreed upon after the secured claim has fallen due. In Austria the debtor can authorize the creditor to sell the property in the debtor’s name without intervention of a court if the debtor defaults; such authorization must be given in writing, the signatures must be certified.<sup>198</sup> If the authorization and the credit agreement are concluded at the same time, the authorization has to protect the debtor’s interest strictly, guaranteeing that the property will be sold for a fair price (the security cannot be allowed to sell at any price, and even a minimal agreed price is not sufficient).<sup>199</sup> In England, in the case of a

<sup>194</sup> The creditor whose claims have been satisfied, must enable the debtor to have the debt extinguished from the mortgage books (CC § 1369 third sent.).

<sup>195</sup> CC § 469 a.

<sup>196</sup> CC §§ 1163, 1196.

<sup>197</sup> E.g. Austrian CC § 1371; German CC § 1149.

<sup>198</sup> Law on Land Register § 31 par. 1 and 6.

<sup>199</sup> CC § 1371; see also OGH 15.1.2002, 5 Ob 295/01w.

mortgage made by deed, a power of sale arises by operation of law.<sup>200</sup> This applies to all legal mortgages, which must be created by deed, and to those equitable mortgages which are so created. The power arises when the mortgage money has become due; however, the power becomes exercisable only upon the occurrence of the first of three events:<sup>201</sup> the mortgagor's failure to pay the mortgage money on three months' notice in writing; the mortgagor's falling in arrears for at least two months on payment of interests; breach by the mortgagor of an obligation contained in the mortgage agreement or the Law of Property Act 1925. The power of sale can be exercised extra-judicially, and it is up to the mortgagee to choose the time and the mode of sale, whether private or by public auction. In carrying out the sale the mortgagee has certain duties; he must show "that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time".<sup>202</sup> In Scotland, the standard conditions set out in Schedule 3 of the relevant Act<sup>203</sup> regulate every standard security. Condition 10 is one of the non-variable standard conditions which has to be inserted in every deed by which a security is created. According to this clause, the creditor may when the debtor is in default exercise his remedies under the Act in accordance with the provisions of the Act. One of these remedies is to sell the property. The creditor must follow one of three procedures prescribed in the Act before selling the property. These are a calling-up notice; a notice of default; or an application to the sheriff court for a warrant to sell. In a calling-up notice served on the debtor, the creditor requires discharge of the debt and failing that, exercise of any of his/her enforcement powers. If the debtor fails to comply with the notice, the creditor is entitled to exercise any of his enforcement rights including the right to sell the property. The creditor has the power to sell the property by extra-judicial sale. The creditor must advertise the sale and take all reasonable steps to ensure that the price for the property is the best that can reasonably be obtained.<sup>204</sup> Also in The Netherlands when the debtor does not fulfil his obligations the mortgagee has the remedy to sell the mortgaged object without any intervention of a court, returning any surplus proceeds to the mortgagor. The mortgagee must ask a competent notary to sell the mortgaged land in public auction.<sup>205</sup>

### (7.) Intra-European Cross-border Problems

**548. Volume of cross-border secured lending** The EC banking directives have led to important achievements in the creation of a European internal market opened to banks as far as the right of establishment is concerned; however it seems that the same result has not yet been achieved with respect to the freedom to provide services, particularly in

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<sup>200</sup> Law of Property Act 1925, s. 101.

<sup>201</sup> Law of Property Act 1925, s. 103.

<sup>202</sup> *Tse Kwong Lam v Wong Chit Sen*, [1983] 1 W.L.R 1349 at 1355 (P.C.).

<sup>203</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s. 11 (2).

<sup>204</sup> Conveyancing Act (preceding n.) s. 25. See *Associated Displays Ltd (In Liquidation) v Turnbeam Ltd.*, 1988 SCLR 220; *Dick v Clydesdale Bank plc.*, 1991 SC 365; *Bisset v Standard Property Investment plc.*, 1999 GWD 26-1253.

<sup>205</sup> CC art. 3:268 par. 1.

the field of cross-border mortgage credit. There is no European-wide data source on the volume of cross-border lending; however, it is widespread opinion that this lack of data is related to the near non-existence of this type of activity. This is substantially confirmed by the national experts we have consulted. According to one of the few quantitative studies on cross-border lending,<sup>206</sup> in Germany outstanding cross-border residential mortgage loans reached 908 million DM by end-1996, which made up for 0.27% of the total outstanding. The outstanding cross-border commercial mortgage loans in turn reached more than ten times that level: 9,204 million DM; here cross-border lending made up for 5.39% of the total. Compared to their relative importance, commercial cross-border lending accounted for a 20 times higher relative share as compared to residential mortgage lending.

**549. Present legal conditions** The differences between legal systems are at least in some cases too broad and act as a deterrent;<sup>207</sup> as a matter of fact, the application of the provisions of private international law, even if uniformed, might discourage the granting of a cross-border mortgage credit. In fact, when a bank is asked to grant a loan secured by a piece of real estate located in another member state, it has to be sure to have a valid loan agreement and a valid entitlement to the mortgage. Moreover, it has to know whether it is sufficiently protected if the borrower defaults and, in the worst case, if the borrower goes bankrupt. For the loan agreement in commercial lending the *lex contractus* is generally respected; more problems may arise when the borrower is a consumer and is not resident in the country where the lender is incorporated.<sup>208</sup> According to the rules of private international law the conditions for the validity of a mortgage, its scope, rank and legal effects are regulated by the *lex rei sitae*. Consequently, the opportunity for a bank to award a credit secured by an immovable located in another member state strictly depends upon the legislation of the latter: the creation and the effects of the security follow the law of the country where the immovable is located. This, in turn, means that, at least from a theoretical point of view, the creation of an internal market for financial services can be hampered by the divergences of national mortgage laws.

**550. Experiences of member states with diverse legal systems** In order to understand the impact of these divergences on the development of an internal market in Europe, it might be useful to consider the experiences of some multi-jurisdiction systems, like the

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<sup>206</sup> *Lea/Welter/Dübel*, Study on mortgage credit in the European Economic Area. Structure of the sector and application of the rules in the Directives 87/102 and 90/88 (Final report on Tender no. XXIV/96/U6/21).

<sup>207</sup> Obviously, there are also other reasons for the low level of cross border mortgage lending. For instance, indigenous lenders certainly have better information on borrowers and properties. Fiscal differences across countries may also affect the feasibility of cross-country transactions.

<sup>208</sup> The invalidity of the loan contract may affect the mortgage created by that agreement. The mortgage loan is not regulated by the Consumer Credit Directive; nevertheless most member states have included mortgage loans in the national laws on consumer credit or have passed laws which specifically deal with mortgage loans. The provisions of these laws are often considered of "public order" and a contract, which does not respect them, is then to be considered invalid, even if it is regulated by another national law, when permitted.

United States, the United Kingdom, and, to a certain extent, Spain. In these member states, the formalities and the technicalities involved in the creation of the mortgage might differ depending on where the immovable is located. Nevertheless, it seems that these divergences are not a significant obstacle to the development of an internal market within these legal systems. One of the experts we have consulted, Professor *George Gretton* (University of Edinburgh) has noted that whilst English and Scottish legal institutions remain distinct, cross-border lending is nowadays common, both for commercial and for non-commercial loans; the fact that the legal basis for such lending differs in the two countries has not proved to be a significant problem.

**551. Lessons from the British experience** If the British experience can be extrapolated at a European level, the conclusion would be that cross-border secured lending is unusual not because of differences in legal systems but for other reasons. However, it is important to underline that the crucial point is the overall measure of the differences. In the national legal systems mentioned above, divergences are never very broad. In most cases they relate to the different technicalities necessary to create the mortgage and to complete all the formalities required by the different regulations of the public registers. Divergences in technicalities obviously produce transaction costs, but these transaction costs, in most cases, simply imply the necessity to contact local professionals (lawyers, notaries, etc.) that will take care of the necessary formalities. It is plausible, however, that this kind of transaction costs will not be too burdensome for the parties: they need to consult professionals in any case, and they simply have to choose a local professional. Moreover, these transaction costs are generally foreseeable *ex ante*, and thus sufficiently certain; in any case, they are not radically different depending on the nationality of the lender. The situation is completely different if divergences are not limited to technical problems, but are related to the global discipline of mortgages. The British experience, for instance, cannot be considered a good mirror of the European situation. Firstly, whilst English and Scottish legal institutions remain distinct, the difference is not radical, compared to other European legal systems, and both English and Scottish law can be considered rather creditor-friendly (for instance, both countries have rather agile and swift procedures for the enforcement). On the other hand, English and Scottish lenders are in general among the most enterprising in Europe. This is widely confirmed by anecdotal evidence. UK lenders have been pioneers in cross-border lending, establishing subsidiaries or branches to conduct their business. *Jacobien Rutgers* informs us that at the moment there is an advertisement on the radio that encourages people who have a house in The Netherlands to borrow money from the Bank of Scotland, the loan to be secured by a Dutch mortgage.

**552. “Natural” impediments** Some European countries confer a monopoly upon local notaries with regard to the drafting of the mortgage deeds.<sup>209</sup> The importance of this must

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<sup>209</sup> See French CC art. 2128; Dutch CC art. 3:31. In Spain, mortgages created abroad are not registered. This was endorsed by a mandate included in the Law of 1 July 1992 concerning foreign investments, which established an obligation for a Spanish notary public to intervene in such operations; this Law is no longer in force, but the Ministry of Justice and the General Agency of Registers and the Notary Publics still insist on this requirement, contrary to the majority of experts' opinions.

not be overrated; as we have already said, the parties will in any case usually choose a notary qualified in the country where the land is. The necessity to choose a local notary or lawyer, together with other factors (e.g. the cost for obtaining information on the borrower and the property, but also the costs connected with overcoming the linguistic barriers), may be sufficient to exclude the feasibility of cross-border mortgage lending for small economic operations, but is not in itself a decisive problem for more important commercial or even non-commercial loans.<sup>210</sup> This may explain the greater importance of cross-border mortgage lending in commercial transactions than in residential ones. – In practice, one of the more important differences (and a major worry for potential lenders in commercial transactions) comes from the enforcement of security rights. The complexity and rigidity of the executory procedures (and the time they take) vary widely; and the attitude towards clauses authorizing immediate enforcement of the security differs thoroughly in the different legal systems. If the parties are not able to easily predict how and when their security interests will be enforced, transaction costs in secured cross-border credit become extremely high.<sup>211</sup> – Another important factor of uncertainty is related to the existence of other charges or interests prevailing over the mortgage even if not recorded or recorded after it. While this is to some extent true for most countries (e.g. expenses of justice), in some countries these prevailing privileges are such as to severely limit the rights of the mortgagee.<sup>212</sup> Uncertainty on enforcement of mortgages is also a prominent source of transaction costs, because it has an immediate and direct impact on the “credit rating”. If in a certain legal system, a secured credit is enforceable only by long and expensive procedures, the rating for the quality of that credit will be low, whereas in those systems where enforcement procedures tend to be efficient, the credit rating will be high. In other words, it is important to underline that the inherent quality of a secured credit basically depends on how the security is enforced by local courts or other local authorities. When the level of efficiency of enforcement procedures varies among different systems, those systems where the quality of procedure is poor will be considered as systems where the quality of credit is poor as well.<sup>213</sup> This situation, in turn, implies a relevant

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<sup>210</sup> *Jacobien Rutgers* informed us that a Dutch bank (F. van Lanschot Bankiers) has a special product, *de buitenland hypotheek* (mortgage abroad) which can be used to finance a holiday home abroad. An element of this product is that a mortgage will be created over the holiday home abroad. This mortgage is used in Belgium, Germany, England, France, Italy, Luxembourg and Spain. However, the minimum price of the property to be bought must be € 500,000.00. Moreover, this is quite a specialised business at present. The Verband Deutscher Hypothekenbanken has expressed the view that the vast majority of the members of the association will be unwilling to consider cross-border mortgages for less than € 2 to 5 million since the additional cost of “foreign” mortgages must be compensated by a larger margin in order to ensure profitability.

<sup>211</sup> Executory procedures are especially important for commercial mortgages, because statistically residential loans are performed much more frequently than commercial loans.

<sup>212</sup> E.g. in France the rights of the workers prevail on the right of the mortgagee, see CC art. 2095 and art. 2105, Commercial Code art. L 621-32.

<sup>213</sup> The different efficiency of the national mortgage systems partially explains the fact that the importance of mortgage markets differs widely across the European countries; according to a 2000 study (*Hardt/Manning*, European mortgage markets: structure, funding and future development, June 2000, European Mortgage Federation), in the United Kingdom, Germany and the

obstacle to the creation of an efficient internal financial market, because the low quality of credit will be considered by foreign banks as a strong “barrier at the entrance” to that particular national market. As a consequence, the foreign bank will tend to raise the interest rate applied for a system where enforcing procedures are more complex, and will then prefer to establish a separate subsidiary in that country rather than offering directly (*i. e.*: without creating separate legal entities) its financial services. If European banks find it more convenient to use their right of establishment rather than their freedom of providing services, the costs of cross-border transactions will increase. At the moment, cross-border initiatives usually focus on depository institutions establishing branches or subsidiaries in other countries to obtain funds and make loans. Finally, a peculiar problem that might derive from the divergences between the different legal systems arises for the so called “mortgage bonds”, *i. e.* bonds which represent credit secured with a mortgage. As a matter of fact, in order to create an internal European market for this particular form of bonds, it is necessary that the quality of each of these bonds only or mostly depends on the inherent value and quality of the economic system and of the underlying product market in which a certain mortgage bond is created. Financial markets tend not to appreciate financial instruments the quality of which strongly depends upon “institutional factors”, such as the particular applicable law. Also the development of mortgage bonds thus requires a substantial uniformity of the different laws on security rights.

## V. Trust Law\*

### (1.) Introduction

**553. Focus on the common law trust** This chapter examines points of interaction between contract law and trust law, comprehending the latter in the sense of the common law, and from this standpoint assesses the difficulty of formulating general principles of contract law in isolation from trust law. Such is the range of interconnections and overlapping of trust and contract law fields from a common law perspective that no more than an arbitrary selection can be presented here. At the same time, this selection should provide a hint of the wider multitude of complex interrelationships between the two areas of law and underline the conclusion that trust law and contract law form two integral parts of a private law whole, each of which presupposes supporting rules in the partner domain like interlocking pieces of a jigsaw.

**554. Focus on private trusts and the commercial context** In keeping with the objective of the study, which is orientated towards the question of barriers to enhancement of trade and obstacles to improved competition within the internal market, the primary focus of the chapter is on commercial uses of trust and trust law rules arising by operation of law within commercial fields. This should not, however, mask the fact that contract law and trust law connect in less commercial environments such as settlements of family prop-

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Netherlands the volume of residential mortgage loans outstanding was equivalent to 50 % of gross domestic product or more, while in Italy and Greece it was equivalent to less than 10 %.

\* Authored by *Stephen Swann*.

erty. Equally the chapter does not dwell on uses of trusts in the furtherance of charitable purposes and the property holdings of unincorporated associations, which in continental jurisdictions might be regarded as matters of corporation or quasi-corporation law. Here too trust law has an intense role to play in the administration of wealth for (in the widest sense) business purposes – unsurprisingly so since the trust device was the precursor of what, after statutory intervention, became the joint stock company. A consideration of these fields, however, would take us into the wider problem of differentiating contract law and (in an expanded sense) company law. Finally, it should be noted that the chapter concentrates on trusts of movables – in the vocabulary of the common law, goods (personal chattels) and things in action. Trusts of land as such (which are in many matters subject to distinct rules of their own) may be put to one side since our focus is on obstacles to the free movement of wealth. Freedom of trustees to invest in foreign land, on the other hand, is a material matter as regards cross-border movement of capital and this issue is addressed below.

**555. Arrangement of the chapter** The material is divided into three parts. The first section ((2)-(4)) consists of essential background information, setting the wider context to particular issues examined here. The chapter then proceeds ((5)) to outline the partnership character of the relationship between trust law and contract law on the selective basis explained above. Regard is had here to trusts implied by law (so-called resulting and constructive trusts) as well as those created voluntarily (express trusts). This is then followed, in the final substantive section ((6)), by a review of certain rules of trust law in the common law jurisdictions of the EU which might be regarded as tending to inhibit the effective cross-border operation of trusts. The substantive material and illustrations are taken primarily from the law of England and Wales, but considerable reference is also made to the two common law jurisdictions in Ireland (Northern Ireland, Republic of Ireland) and there are occasional pointers to similar principles in the hybrid common law/civil law legal system of Scotland (despite, perhaps, a theoretically different basis for the trust in that latter jurisdiction). This comparative material confirms to some extent the breadth and depth of influence of certain English legal principles in those legal systems where a trust of a quasi-proprietary nature is recognised. In determining the aggregate significance of the issues raised in this chapter within the wider European context it must be recalled that there are other jurisdictions among the present and prospective member states and within the European Economic Area which have either ratified the Hague Convention on the Law Applicable to Trusts and on Their Recognition or have trusts law which have been influenced by the English legal experience.<sup>214</sup> Thus the difficulties of adjusting trust law to any Europeanised ‘pure’ contract law stretch well beyond the common law frontier within the European Union.

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<sup>214</sup> The other existing member states which have ratified the Convention are Italy (ratifying on 21st February 1990 by the Law of 16th October 1989, the Convention coming into force in domestic law on 1st January 1992) and the Netherlands (ratifying on 28th November 1995). Among the prospective member states, Malta ratified the Convention on 31st December 1995. Moreover, elsewhere among the British Isles, most especially Jersey, the indirect influence of English legal experience in generating a comparable trust law institution within the legal system is evident.

## (2.) Nature of the Common Law Trust and Its Relationship to Contract Law

556. **Outline** Neither in case law nor in statute law<sup>215</sup> is there a satisfactory definition of the trust institution in the common law, nor is there an exhaustive and undisputed description of the elements which constitute it or the precise circumstances in which it will arise. Its very flexibility and the fact that (for lifetime transactions at least) it may be adopted for purposes which in continental legal systems would be effected wholly or in part by mandate or other contractual arrangements<sup>216</sup> – and, indeed, might well also be effected by means of contracts in common law systems (albeit with less success perhaps) – only serves to underline the difficulty of disentangling the one from the other. Any attempt at distinction in the contemporary law inevitably invites qualification. The existence of a trust in certain recognised circumstances has sometimes more to do with historical treatment than logical dogmatic analysis. This, it must be stressed, has often been because of the perceived inadequacies of contract law to capture a completely just solution to a given problem. Almost by definition, therefore, trust law has frequently adopted a supplementary or complementary role to contract law, presupposing a given rule in contract law and ‘correcting’ the outcome by the addition of further (trust law) principles. Conversely, the development of trust law solutions has had the effect that contract law has at times retreated or at any rate abdicated problems to the domain of trust law. Clearly, as the following material suggests, a re-drawing of the boundaries and content of contract law necessarily threatens to throw up a range of difficulties for the scope of trust law and to unsettle this hitherto ‘composite’ private law analysis.

557. **Basic features of the trust** Typically, at least, a trust may be described as the legal relationship arising where one party is obliged to hold property for another or others – an obligation which normally entails both positive duties (among others: of safeguarding, investing and managing the fund) and negative ones (such as the obligation not to make an unauthorised profit from the trust office). Clearly the existence of obligations derived from the trust office and the fact these obligations may arise out of a voluntary transfer of property to hold on the terms of the trust confer a contract-like character on the institution. Chief distinctions from a ‘pure’ contractual relationship, however, are the facts that (i) (in the common law systems)<sup>217</sup> the trust is as a rule enforced not by the settlor, but by those who stand to benefit directly by its execution (the *cestui que trust* or beneficiaries) and (ii) while in his ownership, the property does not form part of the

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<sup>215</sup> The definition of the term “trust” in the Hague Convention on the Law Applicable to Trusts and on Their Recognition (art. 2) is, however, given effect to under the Recognition of Trusts Act 1987, s. 1 and Sched., for the United Kingdom.

<sup>216</sup> This is because continental contract law has not suffered from two of the major restrictions of English Common Law which spurred the inventiveness of Equity to complement contract law by the development of the trust instrument. These include (i) the doctrine of consideration which disabled a person from making a binding gratuitous unilateral promise except by the formal means of a deed and (ii) the inability (until statutory reform, referred to below) of third parties intended to be benefited by a contractual undertaking to enforce that promise.

<sup>217</sup> The position is considered otherwise in Scottish law, where the trustor and his executors have certain residual rights to enforce the trust.

estate or patrimony of the trustee and is thus not subject to the claims of his personal creditors, whether on execution or bankruptcy. Rather the right to enjoy and enforce the trust amounts to a beneficial interest of the *cestui que trust*, alienable by the beneficiary and taking on for most purposes a proprietary character (at any rate where the interest subsists under a fixed interest trust, i. e. a trust where entitlements are quantified by the terms of the trust themselves rather than the discretion of the trust). Furthermore, by virtue of the quasi-proprietary nature of the beneficial interest,<sup>218</sup> the burden of trusteeship may pass and the entitlement of the beneficiary may come to be enforceable against persons who receive trust funds other than as a *bona fide* purchaser for value of the legal interest without actual, imputed or constructive notice of the beneficiary's right.<sup>219</sup>

**558. Significance of classification as contract or trust** It is obvious, therefore, that the classification of a legal relationship in the common law as one merely of contract or, alternatively, as one giving rise to a trust is of supreme importance in determining the extent of the right obtained by the creditor/beneficiary. The enforceability of a beneficial interest against the trustee's personal creditors and against a range of third party acquirers from the trustee renders this considerably more secure than a mere contractual claim against a debtor. This is further enhanced by the ability to trace the beneficial interest into the hands of recipients where trust property is mixed with property of the recipient and into the proceeds of such mixtures. Moreover, the content of the trustee's obligations in comparison with that of a debtor (assuming the matter is not otherwise regulated by the terms of the trust/contractual agreement) may deviate markedly. A trustee is as a rule obliged to invest the property in his hands for the advancement of the beneficiaries, whereas a debtor is ordinarily entitled to apply the benefits he has received under the contract to his own ends and may retain the profits generated by its use – even if he has received the benefit as a stakeholder and thus, within contract law, performs a very similar function to a trustee.<sup>220</sup> Conversely, a trustee is not an insurer or guarantor of the

<sup>218</sup> The exact classificatory nature of the beneficiary's entitlement may be regarded as a matter of controversy – even in the discourse of the common law which has characteristically (and perhaps lazily) regarded it as a form of property. For present purposes it suffices to recognise that the right is not equivalent to a mere personal right in any traditional sense and the term 'quasi-proprietary' is used here to denote the "superadded" strength of a beneficial interest in comparison with an ordinary contractual claim.

<sup>219</sup> This principle is modified in relation to the protection of beneficial interests in land and the acquisition of land from trustees free of such interests. However, as the introduction indicates, these special principles fall outside the remit of this chapter and are therefore not addressed here.

<sup>220</sup> See *Potters v Loppert* [1973] 1 Ch 399 (Pennycuick VC), where a claim for interest on a deposit held by estate agents pending conclusion of a contract for the purchase of a house and subsequently repaid failed. In relation to estate agents holding contract or pre-contract deposits for the acquisition of land in the United Kingdom and receiving the in course of estate agency work in England, Wales or Northern Ireland, a statutory trust of the client money is now imposed: see Estate Agents Act 1979, s. 13 and see s. 15 specifically as to interest. While this reversed for the future the specific outcome in the litigation, it leaves the general principle of law unaffected.

trust fund and in the absence of some breach of trust of his will not be liable for the depreciation or disappearance of the trust fund.<sup>221</sup> Save where the contract is frustrated, a borrower, by contrast, is not excused by an absence of fault from liability to repay funds made available for his use unless loss is the fault of the lender. Consider the case where there is a chain of liabilities in a three party situation. An obligor (B) who has obtained a right of indemnification for his liability to the obligee (C) from a third party (A) is in a different position from a creditor (B) who constitutes himself a trustee of his contractual right against the debtor (A) in favour of a beneficiary (C). Whereas in the latter scenario the intermediary (B) is not liable to account to the beneficiary of the trust (C) save in so far as the debtor (A) pays (or could be made to pay), a failure in the alternative case of the third party (A) to make good the indemnification will not relieve an obligor (B) from his own contractual liability (to C).<sup>222</sup> The risk of A's insolvency lies with B if the chain consists only of contractual rights, but with C if B's relationship to A is one of trust. Furthermore, as the text below outlines, trust law, in contrast with contract law, involves an extensive jurisdiction for the courts to intervene in, and if necessary take over, the administration of trusts. Thus even the relationship of the parties to the courts turns on the nature of the private law relationship created.

**559. Hidden traps** It is clear from the foregoing that the existence of overlapping fields in which an undertaking might assume either a contractual or a trust form means that the divination of the precise nature of an intention to be bound *in a particular way* assumes critical importance. (The example of a stakeholder – one receiving property to be paid to one or other of two parties according to a prescribed extrinsic outcome – is a case in point.)<sup>223</sup> It is a test of substance precisely whether a person has an undertaken to hold and administer property as a trustee; the application of that test in turn assumes that one appreciates the distinction between a contractual obligation and a declaration of trust. For European lawyers unfamiliar with the trust concept and prone to think in

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<sup>221</sup> *Morley v Morley* (1678) 2 Ch Cas 2, 22 ER 817 (Lord Nottingham LC) (trustee robbed of the trust funds by his servant held not liable to restore the sum).

<sup>222</sup> Cf. *Carr v Roberts* (1831) 2 B & Ad 905, 109 ER 1379 (Court of King's Bench). The distinction in that case was material not for purposes of liability in private law, but rather public law liability to estate (stamp duty) taxation. The decisive issue was whether the contractual right of the deceased (i. e., in our terminology, the intermediary B) was held on trust, since in the latter case the contractual right would not have been beneficial property of the deceased forming part of his patrimony and would therefore not have been subject to duty.

<sup>223</sup> “[O]ne might perhaps at first sight expect that where any property is placed in medio in the hands of a third party to await an event as between two other parties the third party receives that property as trustee [...] Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal upon a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend upon the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.” *Potters v Loppert* [1973] 1 Ch 399, 405H-406C (Pennycuik VC).

purely contractual categories (let alone working in a foreign language), the nuance of a legal undertaking in the common law environment may be much less than apparent and fraught with hidden traps.

### (3.) Significance of Trust or Contract for Limitation of Actions

**560. General rules** The ability of a beneficiary to enforce their rights against third parties in certain circumstances is not the only enhancement of the legal position of a beneficiary vis-à-vis a mere contractual creditor. The characterisation of a legal relationship as one of trust or mere contract may assume significance for the endurance of liability arising out of a failure to fulfil obligations incurred. The rules on limitation of actions differentiate between claims arising from contract and those arising under the law of trusts.<sup>224</sup>

**561.** The general time limit for bringing actions in respect of a breach of contract is six years.<sup>225</sup> The same time period also applies generally to actions to recover trust property or in respect of a breach of trust.<sup>226</sup> However, the beneficiary of a trust is privileged in two cases where there is no prescribed period following whose expiry an action for redress automatically ceases to be maintainable. In such a case action may be barred nonetheless (by the doctrine of laches) if, having regard to the length of delay in commencing litigation and intervening conduct of the parties, it would be unconscionable for the beneficiary to be permitted to maintain the action after the given lapse of time. In appropriate circumstances this latter flexible test can accommodate generous time periods well in excess of the statutory provision otherwise applicable to personal actions.<sup>227</sup> For this reason the existence of a trust relationship in contrast to a mere contractual one may confer real additional benefit for those on whose behalf property is being administered.

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<sup>224</sup> In addition to the special rules noted in the text, the following is also of note. There is a postponement of the accrual of the right of action in respect of future interests in personalty until the interest falls into possession: Limitation Act 1980, s. 21(3), and in the Republic of Ireland, the Statute of Limitations 1957, s. 43(1)(b).

<sup>225</sup> In the Republic of Ireland: Statute of Limitations 1957, s. 11(1)(a). However, for claims on a specialty or a covenant under seal a period of 12 years may apply: see Limitation Act 1980, s. 8, and in the Republic of Ireland the Statute of Limitations 1957, s. 11(5).

<sup>226</sup> Limitation Act 1980, s. 21(3). For the Republic of Ireland: Statute of Limitations 1957, s. 43(a). Note that different rules apply in respect of recovery of land, which are not considered here.

<sup>227</sup> See *Weld v Petre* [1929] 1 Ch 33 (Court of Appeal), especially the judgment of Lawrence L.J. at p. 55, a case concerning the entitlement of a mortgagee to redeem late a mortgage of corporate shares, but confirming that there is no rigid rule that an equitable claim must necessarily be acted on at the utmost within 20 years.

**562. Exceptional cases** The first exceptional case concerns actions against a trustee, or a recipient of trust property from the trustee,<sup>228</sup> in respect of fraud or fraudulent breach of trust in which the trustee or someone for whom he is vicariously liable<sup>229</sup> actively or passively knowingly participated.<sup>230</sup> The second is that of actions to recover from a trustee trust property or its proceeds which are still in the trustee's possession or which he has converted to his use.<sup>231</sup> Hence, where a trustee has been in wrongful occupation of trust property for 21 years, that trustee will be liable (subject to the defence of laches, if applicable) to pay a notional occupation rent for the full period of occupation and not merely the last six years.<sup>232</sup> The same principle would apply in respect of a movable improperly retained by the trustee which should have been let out on hire. These exceptional cases in which an action based on a breach of trust is not subject to a statutory limitation period are not applicable to all trusts. Though the statutory definitions governing the scope of the provisions are not free from obscurity, it would seem the exceptional rules apply only in respect of express trusts and certain types of implied trusts which for these purposes are assimilated to express trusts (on which the above rules are modelled).<sup>233</sup> In addition to express trusts declared and constituted by a settlor they extend to (i) resulting trusts<sup>234</sup> and (ii) certain types of constructive trusts –

<sup>228</sup> See *G. L. Baker Ltd v Medway Building and Supplies Ltd* [1958] 1W.L.R. 1216 (Danckwerts J), construing the predecessor statutory provision, s. 19(1)(a) of the Limitation Act 1939. The judgment was reversed on appeal, but not so as to affect this point.

<sup>229</sup> Cf. *Moore v Knight* [1891] 1 Ch 547 (Stirling J) (concerning an earlier similarly worded provision contained in the Trustee Act 1888, s. 8).

<sup>230</sup> Limitation Act, s. 21(1)(a). In the Republic of Ireland: Statute of Limitations 1957, s. 44(a).

<sup>231</sup> Limitation Act, s. 21(1)(b). In the Republic of Ireland: Statute of Limitations 1957, s. 44(b). As an example of conversion to the trustee's use, *Lewin on Trusts*, ed. by John Mowbray and others, 17th edn. (London: Sweet & Maxwell, 2000), § 44-12 gives the example of a deduction from the trust property of fees which are not authorised by the terms of the trust.

<sup>232</sup> *Re Howlett* [1949] Ch 767 (Danckwerts J). However, since the trustee's liability was subject to a reasonable allowance for maintenance provided to the beneficiary during co-occupation, the trustee was ultimately liable only in respect of the last 16 years. The defence of laches failed because the beneficiary had lacked clear understanding of his rights.

<sup>233</sup> In the Irish statute, the term "trustee" is defined so as to exclude a trustee "whose fiduciary relationship arises merely by construction or implication of law and whose fiduciary relationship is not deemed by any rule of law to be that of an express trustee" (s. 2(2)(a)). This seems sound as regards s. 44 (the exceptional cases), but would result in a dubious narrowing of the scope of application of s. 43(1)(a) (which provides for the general limitation period of six years). Unless the legislature intended to expose implied trustees as a rule to perpetual liability (which would have reversed the pre-existing law and seems inherently doubtful), the latter provision must be read as unaffected by the limited definition in s. 2.

In the English statute, the terms "trust" and "trustee" are given the meanings they enjoy in the Trustee Act 1925 and by s. 68(17) of that Act they extend to implied and constructive trusts, but case law has not regarded s. 21 of the Limitation Act as applying to *all* constructive trusts.

<sup>234</sup> *Lewin on Trusts*, § 44-06.

among others<sup>235</sup> those arising from the voluntary assumption of trust office (e.g. intermeddling in a trust to act as trustee),\* inconsistent dealing with trust property by persons properly receiving trust property with knowledge of the trust, but improperly retaining it or applying it for their own benefit,<sup>236</sup> and unauthorised profit-making by trustees on account of their trust office.<sup>237</sup>

#### (4.) Private International Law Difficulties

**563. General pointers** As regards the backdrop to material featuring in the second section of this chapter, it is as well to recall some of the fundamental difficulties which arise in the field of private international law in relation to trusts. Statutory rules setting out the conflicts of law in legal systems which are not parties to the Hague Convention on the Law Applicable to Trusts and on their Recognition often contain no specific provisions for addressing trusts.<sup>238</sup> Civil legal systems find it difficult to apply their rules of private international law to the trust because it divides ownership in a way uncommon in their domestic law – along qualitative lines.<sup>239</sup> The fact that the trust is not to be found as a distinct legal institution in the substantive law presents “extraordinary difficulty” by compelling such courts to qualify the trust by reference to comparable national legal institutions to be found in its substantive law<sup>240</sup> – a process made mentally gymnastic by the absence of close parallels. Particular problems include identifying the person in which ownership resides (trustee or beneficiary?) and, especially when conflict with a third party arises, the nature of the beneficiary’s claim (contractual, extra-contractual, proprietary?), so far, at least, as such rights are conceived as being recognisable. More specifically, there may be difficulties of transposition in relation to discretionary trusts and trusts for beneficiaries who are not yet ascertainable (including the unborn).<sup>241</sup> As transposition takes place, dimensions of the trust may be lost as a result.<sup>242</sup>

**564. Cross-border trust activities** These difficulties in recognition are compounded by the possible dependence of the trust institution on a particular form of adjectival law (such as one granting special remedies like the taking of accounts) and a special

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<sup>235</sup> The exact boundaries of the constructive trust concept for the purposes of the rules on limitation are a matter of debate and only a non-exhaustive enumeration of clearly accepted instances are referred to here.

\* *Soar v Ashwell* [1893] 2 Q.B. 390, 394 (Lord Esher MR).

<sup>236</sup> *Ibid.*, 396-397 (Bowen L.J.).

<sup>237</sup> See generally the judgment of Millett L.J. in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, setting out the legislative and interpretative history.

<sup>238</sup> E.g. in Germany, Arts. 3-46 EGBG.

<sup>239</sup> Cf. Kurt Lipstein, *Trusts* (1994) Int. Encycl. Comp. Law, Vol. 3, Ch. 23, paras. 5 and 41.

<sup>240</sup> Harold Goldstein, *Trusts of Movables in the Conflict of Laws* (1966) 74.

<sup>241</sup> Goldstein 78.

<sup>242</sup> Compare, for example, Goldstein, p. 88 n 313, commenting on the German law of succession: “The relative inelasticity of the *Erbrecht* restricts the possibilities of exact transposition in many cases.”

relationship with the courts (such as the ability to apply for directions or administration: see below). The absence of suitable equivalent structures and the danger of a perceived ‘incorrect’ or ‘inadequate’ application of the trust institution outside the common law jurisdictions provide good cause for an ultra-cautious approach to cross-border trust activity. They also, however, tend to reinforce in the legislator and the courts in the common law jurisdictions a protective attitude towards trusts in which cross-border activity, at any rate so far as it spills into civil law jurisdictions, is treated at the very least as being of doubtful utility and at the highest as wayward and something to be actively discouraged. Moreover, when a common law trust is to be voluntarily ‘exported’ into a civil law jurisdiction which does not recognise it as anything more than a form of agency, the tendency would seem to be for the parties to embark on an elaborate definition of the functions to be undertaken in order to particularise the full extent of duties and responsibilities involved.<sup>243</sup> To this extent the dysfunctional alignment of trust and non-trust jurisdictions within the European Economic Area generates its own substantial and costly administrative burdens in terms of the need for expert drafting and the provision of extensive (and expensive) legal advice.

**565. Experience from the European Coal and Steel Community** This general problem can be seen even in the experiences of the European Coal and Steel and Community itself, where the absence of a broadly comparable law of trusts in the EU precluded a uniform approach to commercial arrangements intended to be carried out on a common basis throughout the Community. The disbursement of ECSC funds to Community enterprises, secured by invoking the Bank for International Settlements as an intermediary on the basis of an Act of Pledge in a manner which the Common Law would have assimilated without difficulty on the basis of trust law, proceeded on a different footing according to the various jurisdictions into which funds were to flow: a pledge in France, Belgium and Luxembourg (*gage*) and likewise – though on the basis of a different contractual matrix – in Italy, but a fiduciary transfer of security (*Sicherungsabtretung*) in Germany.<sup>244</sup>

## (5.) Trust Law in Conjunction with Contract Law in the Common Law

### (a) Interconnections in trust and contract law in outline

**566. Overview** As already indicated in the introduction, trust law has evolved in part as a supplement to contract law, performing functions which, by virtue of technical rules of the common law could not be achieved or could not easily be realised within contract law. It has also performed a complementary role in enhancing the remedies and redress

<sup>243</sup> Cf. G.K. Simons and L.G. Radicati, “A Trustee in Continental Europe: The Experience of the Bank for International Settlements” (1983) 30 *Netherlands Int. L. Rev.* 330, 334.

<sup>244</sup> See Simons and Radicati, “A Trustee in Continental Europe: The Experience of the Bank for International Settlements”, pp. 339-344. The authors conclude, significantly that “under continental law an extremely complex procedure is often required in order to achieve what under common law can be achieved relatively easily by means of a trust.”

provided to innocent parties arising from defaults in contractual performance. This can be seen most straight-forwardly in relation to certain statutory trusts of particular assets transferred by one party to the other or received by one of the parties from a third party which are imposed in order to strengthen the legal position of a given party within the relevant contractual relationship.<sup>245</sup> The essentially pragmatic rather than conceptual or dogmatic approach of equity in intervening to provide relief, however, does not lend itself to a precise severance of contract and trust law domains and rules. Only in the modern law is a growing recognition to be found that some use of trust law notions (especially that of the constructive trust) in order to supplement conventional contract law or restitutionary entitlements are fictions or analogies rather than true applications of trust law. This can be seen, for example, where a contractual transfer is voidable according to equitable principles and the recipient is therefore regarded as holding the property obtained on constructive trust for the transferor,<sup>246</sup> though strictly considered the transferee is merely liable to account for the property received *as if* they were a constructive trustee.<sup>247</sup> There is, in consequence, a rather grey penumbra of fields in which trusts of some description and varying intensity may be said to arise out of contractual cases and which widen the entitlements of parties as between themselves or as against third parties. In general, therefore, as the specific matters selected and illustrated below tend to confirm, a disentanglement of contract and trust law from a common law perspective may be an arduous exercise and one which rather runs against the grain of the common law's historically less than systematic approach to solving private law problems.

**567. Co-existence of trusts and contracts** Unsurprisingly, it can be affirmed as a basic proposition that the existence of a contract between two parties does not preclude the co-existence of a trust between those parties. In fact, in practice most professionals (such as solicitors or banks) assuming the office of initial trustee under an express trust will do so on the basis of contractual agreement with the nominating settlor (or adult beneficiaries), not least to embed their right to remuneration for the discharge of their services. A purchaser of goods or services who pays a deposit or the price in advance of supply (especially where goods are still to be manufactured or appropriated to the contract and therefore no title can pass on conclusion of the contract) may, if the supplier accepts the money on these terms, impress the money with a trust as a means of protecting the purchaser against the insolvent default of the supplier, the latter retaining a beneficial interest in the money until counter-performance is made and thus at least a right to repayment of the transferred funds effective against the supplier's other creditors.<sup>248</sup> However, in order that any trust can arise out of payments to a debtor, whether it be creditor

<sup>245</sup> For example, trusts of certain deposits received by estate agents from clients (Estate Agents Act 1979, s. 13, referred to above) and contributions to service charges paid by tenants of certain leasehold property (Landlord and Tenant Act 1987, s. 42).

<sup>246</sup> Cf. *Allcard v Skinner* (1887) 36 Ch D 145 (judgment of Kekewich J), relating to a donation voidable for undue influence.

<sup>247</sup> See *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 409e-g (Millet L.J.), concerning a disposition voidable for fraud.

<sup>248</sup> Cf. *Re Nanwa Gold Mines Ltd* [1955] 3 All ER 219 (Harman J).

or debtor who declares the trust, it will not suffice that funds are placed in a separate bank account. The terms of the trust, that is to say, the circumstances in which the money may be disbursed by the recipient, must be sufficiently certain.<sup>249</sup>

(b) Interconnections in giving credit: the example of the *Quistclose trust*

**568. Trusts of loans for specific purposes: Quistclose trusts** This potential for duality of legal relationships assumes particular significance as a form of secured lending in the context of so-called *Quistclose*<sup>250</sup> trusts. While there is considerable discussion about the precise nature of the trust which arises,<sup>251</sup> English case law has established that a trust may arise where funds are loaned for a specified purpose, that is to say, the loan is expressed to be subject to the condition that it only be used for the agreed purpose.<sup>252</sup> *Quistclose* trusts are recognised correspondingly in Northern Ireland.<sup>253</sup> Despite the absence of appreciable judicial treatment of *Quistclose* trusts in the Republic of Ireland, commentary indicates that trusts of this nature are likely to assume increasing significance in the future in that jurisdiction too.<sup>254</sup>

**569. The security effect of Quistclose trusts** Within the framework of the *Quistclose* arrangement the creditor's right *qua* beneficiary of the trust determines only when the funds are in fact disbursed for the agreed purpose: the creditor is then left with a mere contractual claim under the agreement for repayment of the loan. In this manner, in the period between grant of the loan and its utilisation for the agreed purpose, a trust right on the part of the creditor subsists in parallel with a contractual obligation on the part of the borrower to pay a debt.<sup>255</sup> The parallel existence of a beneficial right under a trust of the funds confers on the creditor proprietary security (as beneficiary under a trust) which supplements the unsecured contractual right he enjoys as lender. This protects the lender against other creditors if the funds cannot for any reason be used for the agreed purpose or if, before they are used, the debtor goes bankrupt or into liquidation: the funds loaned do not form part of the debtor's bankrupt estate.

<sup>249</sup> Cf. *Re Challoner Club Ltd* (1997) Times, 4th November (Lloyd J) (no trust of members' contributions to the company which were not to be touched 'until the company's future was resolved').

<sup>250</sup> The name is taken from the leading case *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567 (House of Lords).

<sup>251</sup> See, for example, the literature cited in *L.A. Sheridan, The Law of Trusts*<sup>12</sup> (1993), p. 214 n 87. The best analysis is probably that the loan gives rise to a trust for the creditor (settlor and beneficiary) in which the debtor (trustee) is granted a special non-fiduciary power to appoint the funds for his own benefit in the manner agreed.

<sup>252</sup> See, for example, following and applying the *Quistclose* decision, *Re EVTR* [1987] BCLC 646 (Court of Appeal).

<sup>253</sup> See *Re McKeown* [1974] NI 226 (Lord MacDermott).

<sup>254</sup> *Hilary Delany, Equity and the Law of Trusts in Ireland*<sup>2</sup> (1999) 143.

<sup>255</sup> See *Neste Oy v Lloyds Bank plc* [1983] 2 Lloyd's Rep 658, 663 (Bingham J).

570. **The economic function of Quistclose trusts** *Quistclose* trusts are typically deployed for purposes of re-financing; the agreed purpose of the loan is often the discharge of a debt owed by the borrower to a third party. Where the prospective borrower is already a heavily indebted debtor, a borrower may be desirous of a temporary new credit or alternative credit arrangements in order to keep an ailing enterprise going during difficult times. The creditor will be anxious in such circumstances to ensure that the loan is applied for the purpose of 'wiping the slate', rather than see the funds disappear through the yawning financial cracks in the enterprise and allow himself to join the long queue of general creditors. The ambition is thus one of substitution of debt, rather than its addition. The protection provided by *Quistclose* trust principles enables the financier to contain risks and (as a matter of market theory at least) offer credit on more manageable terms. Conceivably borrowers are able to look to a source of lending at lower cost at times of particular difficulty, such as a cash-flow problem.<sup>256</sup> However, the trust has also been invoked by lenders financing the purchase of new business equipment.<sup>257</sup>

(c) **Constructive trusts of assets subject to specifically enforceable contracts of sale**

571. **Specifically enforceable contracts of sale** A further primary field of interaction between contract law and trust law principles arises in relation to contracts to transfer a proprietary interest (for example, by way of sale) which are specifically enforceable and legal title cannot pass without some act of transfer. These are contracts in which one party has undertaken to transfer title to property to another and, according to the rules governing the equitable remedy of specific performance,<sup>258</sup> the prospective transferee is entitled to compel performance of the contractual promise. Excluded from consideration are thus those contracts for which the transferee will be adequately compensated for a breach of the obligation to transfer title by an award of damages at common law. The typical instance of a contract not specifically enforceable is the sale of generic goods; the availability of alternative supply from the market coupled with a monetary payment for losses sustained is regarded as providing sufficient relief for the disappointed party.<sup>259</sup> The classic instance of a contract which is generally specifically enforceable is a contract to

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<sup>256</sup> See, for example, *Re McKeown* [1974] NI 226, where the borrower was due a substantial sum from a third party as a result of successful arbitration proceedings, but lacked the funds to pay the fees and costs involved in procuring the arbitrational award.

<sup>257</sup> E. g. *Re EVTR* [1987] BCLC 646.

<sup>258</sup> The rules governing the availability of specific performance will be applied where application is made for a mandatory injunction in lieu to achieve the same: *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 W.L.R. 576 (Goulding J) and see also *Fothergill v Rowland* (1873) LR 17 Eq 132 (Jessel MR) concerning an application for a prohibitory injunction to prevent a breach of contract.

<sup>259</sup> See, implicitly *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 W.L.R. 576, 578G-H (Goulding J) (where in the circumstances damages were not an adequate remedy because in the circumstances there was effectively no alternative market supply). However, legal title to specific goods will pass, by force of the agreement, at the time stipulated by the contract: Sale of Goods Act 1979, s. 17(1).

grant or dispose of an interest in land. As regards sales of moveables and intangibles, an important class of contract to which the following applies is that of sale of shares in private companies.<sup>260</sup>

**572. Constructive trust and equitable conversion** In those contract cases where, if an application were made to the court, the prospective transferee would obtain an order of specific performance, that entitlement generates in their favour – for some purposes at least<sup>261</sup> – a constructive trust of the property concerned pending performance. The promisee is placed by the rules of equity in the position they would occupy if the contractual obligation, whose fulfilment the court can and will compel, had already been discharged: that is to say, they are regarded as a matter of equitable rights as already being owner of the property.<sup>262</sup> This shift in *beneficial* ownership implied by the legal system while the actual performance of the transfer is outstanding (and thus legal title remains vested in the promisor) creates a situation in which the promisor holds the property concerned on trust for the promisee.<sup>263</sup> In the case of a sale where payment of the purchase price is also outstanding, the equitable ownership of the promisee is subject to the promisor's interest in payment; the promisor has a charge over the promisee's beneficial interest as security for the unpaid sum. The trust arises the moment the contract is concluded.<sup>264</sup>

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<sup>260</sup> See, for example, *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104 (Court of Appeal).

<sup>261</sup> There is some degree of doubt about the precise nature of the trust. Judicial exposition has tended to qualify the trust: for an extreme example, see *Phillips v Lamdin* [1949] 2 KB 33, 41 (Croom-Johnson J). However, it is by no means clear what, if any, rules of trust law are necessarily inapplicable. Decisions in which the court has declined to apply a trust analysis of the relations between vendor and purchaser, such as *Ridout v Fowler* [1904] 1 Ch 658 (Farwell J) are susceptible of alternative explanation. As the purpose of this chapter is merely to alert to areas of potential difficulty in the interaction of contract law and trust law, it is not necessary for present purposes to probe the exact limitations of the *sub modo* analysis of the trust relationship.

<sup>262</sup> *Gordon Hill Trust Ltd v Segall* [1941] 2 All ER 379, 388A-B (Luxmoore L.J.).

<sup>263</sup> See *Hobroyd v Marshall* (1862) 10 HLC 191, 210 (11 ER 999, 1006) *per* Lord Westbury LC; *Clarke v Ramuz* [1891] 2 Q.B. 456, 459 (Lord Coleridge CJ), 462 (Kay L.J.); *Raffety v Schofield* [1897] 1 Ch 937, 943-945 (Romer J) (exercise of option to purchase land); *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, 113H (Robert Walker L.J.) (sale of shares in a company limited by guarantee).

<sup>264</sup> *Shaw v Foster* (1872) LR 5 HL 338, 349 (Lord O'Hagan); *Lysaght v Edwards* (1876) 2 Ch D 499, 506 (Jessel MR); *Re Bastable, ex parte the Trustee* [1901] 2 KB 518, 526 (Collins L.J.). In the Republic of Ireland a majority of the Supreme Court in *Tempany v Hynes* [1976] I.R. 101 has held in relation to a contract for the sale of registered land at least that the beneficial interest only arises *pro tanto* with payment: *ibid*, 114 (Kenny J). However, the conventional view that the trust arises with the contract, though the vendor retains a substantial interest pending completion, was expressed in the judgment of Henchy J (*ibid*, 109) and has been preferred by the Law Reform Commission: see *Interests of Vendor and Purchaser in Land During the Period Between Contract and Completion*, LRC 49-1995 (Dublin).

**573. Ramifications of conversion: (i) between the contracting parties** The constructive trust operates so as to regulate the rights and liabilities of the parties in respect of risk of arising between contract and transfer. Thus loss in the interim period due to the vendor's failure to discharge the trustee duty to take reasonable care in the management of the property must be compensated as a breach of trust,<sup>265</sup> while a destruction of the property without such breach of trust gives no entitlement to the buyer and does not relieve the buyer of their obligation to pay the outstanding purchase price.<sup>266</sup> Both the buyer's equitable ownership and the contingent liability to pay under the contract, however, provide a sufficient insurable interest for the purposes of insurance law, entitling the buyer to protect themselves against such risk.<sup>267</sup> Moreover, in keeping with the principles of trust law precluding a trustee for making an unauthorised profit from his trust office, the vendor is liable to accounts for benefits received after the due date of transfer.<sup>268</sup> This extends to the case where the vendor disposes of the sale property to a third party instead: the disappointed purchaser may demand payment of the proceeds of the second sale, less any outstanding price under the frustrated sale contract.<sup>269</sup> Similarly, where shares in a private company are being sold, the exercise of associated voting rights is affected by the vendor's fiduciary obligations to the buyer.<sup>270</sup> In this manner, subject to the terms of the agreement, trust law principles determine what would otherwise be regulated on the basis of implied contract terms or, as to part perhaps, the law of unjustified enrichment.

**574. Ramifications of conversion: (ii) in relation to third parties** However, there are other dimensions to the trust relationship which are clearly proprietary in nature and involve repercussions for third parties. Chief among these is the characteristic that equitable ownership may generally be enforced against third parties who have not acquired legal title in good faith, in exchange for value and without actual, implied or constructive notice of the beneficiary's interest: on furnishing any outstanding consideration due from him, the purchaser can compel performance by the new legal owner.<sup>271</sup> Hence, in the event of the seller's insolvency, the purchaser is not placed in the position of a mere

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<sup>265</sup> *Lysaght v Edwards* (1876) 2 Ch D 499, 507 (Jessel MR); *Phillips v Silvester* (1872) LR 8 Ch App 173, 177 (Lord Selborne LC). See, for example, *Clarke v Ramuz* [1891] 2 Q.B. 456 (Court of Appeal, affirming Grantham J). In that case prior to completion the vendor failed to prevent a trespasser from removing large quantities of soil from the land which was the subject of sale. The court confirmed that the vendor as trustee was bound to take reasonable care to preserve the property and, having found that he had taken no care whatsoever, held him liable after completion of the contract to make monetary compensation for his breach of trust.

<sup>266</sup> *Lysaght v Edwards* (1876) 2 Ch D 499, 506 (Jessel MR).

<sup>267</sup> See *Colinvaux's Law of Insurance*, ed. by Robert Merkin, 7th edn. (London: Sweet & Maxwell, 1997), paras. 3.13-3.14.

<sup>268</sup> *Plews v Samuel* [1904] 1 Ch 464 (Kekewich J). The vendor in this case was liable to account to the purchaser in full for rents due and received from a tenant of the sale property after the date fixed for completion and before actual completion.

<sup>269</sup> *Lake v Bayliss* [1974] 1 W.L.R. 1073 (Walton J).

<sup>270</sup> *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104 (Court of Appeal).

<sup>271</sup> *Re Pooley, ex parte Rabbidge* (1878) 8 Ch D 367, 371 (Cotton L.J.).

creditor, but rather can insist on performance of the contract against the seller's trustee in bankruptcy (or, in the Republic of Ireland, the official assignee) in whom the bankrupt's property vests.<sup>272</sup>

**575. Promises to transfer after-acquired property** A constructive trust of the type outlined above likewise arises where one party to a contract has undertaken to transfer to the promisee property which is to be acquired (or created) by that party subsequent to the contract. Providing that the property is defined with sufficient certainty,<sup>273</sup> the promisee has provided valuable consideration and the contract is otherwise specifically enforceable,<sup>274</sup> the beneficial interest in the property will pass and the promisor will hold the

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<sup>272</sup> See *Re Pooley, ex parte Rabbidge* (1878) 8 Ch D 367 (Court of Appeal), where, however, the purchaser could not in fact enforce the contract because he had paid the bankrupt rather than the trustee in bankruptcy; applied in *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122 (Cozens-Hardy J). This right of the purchaser is not encroached upon the power of a trustee in bankruptcy under the Insolvency Act 1986, s. 315, to disclaim (as a species of "onerous property") "any unprofitable contract". (In the Republic of Ireland, the official assignee has the like power under the Bankruptcy Act 1988, s. 56.) That power does not permit a trustee to disclaim a binding and specifically enforceable but uncompleted contract for the sale of the bankrupt's property merely because it would be more beneficial to reduce the purchaser to the status of a general creditor; equitable ownership having passed, the purchaser is not to be deprived of their beneficial interest in the sale property: see *Re Bastable, ex parte the Trustee* [1901] 2 KB 518 (Court of Appeal) (construing the similar previous provision in the Bankruptcy Act 1883, s. 55(1)). The principle applies correspondingly to other specifically enforceable contracts to transfer or confer a proprietary interest: see *Ex parte Holthausen* (1874) LR 9 Ch App 722 (Court of Appeal in Chancery), an authority so far as English law was applicable to a contract of mortgage.

<sup>273</sup> The subject-matter of the contract must be of such a nature and so described that it is capable of being ascertained and identified at the time of the contract's enforcement. Hence the contract must be in such terms that it can be predicated of any specific goods at the time of enforcement whether they fall within the description: see *Tailby v Official Receiver* (1888) 13 App Cas 528, 529 and 531-532 (Lord Herschell), 543 (Lord Macnaghten). However, providing the terms of the contract are not vague, it is not necessary that the contract be limited to future property from a particular source or to be acquired in a particular manner; a promise to transfer all moneys to be received during the life-span of the security, regardless of source, or all future book debts which may become due during that time, irrespective of the business in which they arise, is sufficiently definite: see *Re Clarke* (1887) 36 Ch D 348 (Court of Appeal); *Tailby v Official Receiver, ibid* (House of Lords), overruling *Re D'Epineuil* (1882) 20 Ch D 758 (Fry J).

<sup>274</sup> The view is strongly expressed in by Lord Macnaghten in *Tailby v Official Receiver* (1888) 13 App Cas 528, 548-549, in the context of transfer of debts, that while the contract must be for valuable consideration there is no call for applying rules relating to specific performance. That approach is supported by the decision of the Court of Appeal in *Re Lind* [1915] 2 Ch 345 noted below. However, the view of Cotton L.J. in *Re Clarke* (1887) 36 Ch D 348, 352 and *Joseph v Lyons* (1884) 15 QBD 280, 285 nonetheless seems preferable.

property on trust for the promisee the instant the property is acquired (or created).<sup>275</sup> Thus, for example, a person who has undertaken to pay a specified sum out of the proceeds of sale of his rights in an invention and, following such a sale, applies those proceeds entirely for his own benefit will be regarded as having committed a breach of trust.<sup>276</sup>

**576. Equitable interest of the promisee** The significant points as to the equitable interest of the promisee apply here too. The equitable interest of the promisee in after-acquired property of the promisor is secure against the other creditors of the promisor in the event of the latter's bankruptcy. Significantly, the promisee will obtain an equitable interest in the property even if it is acquired by the promisor only after the latter's bankruptcy, assuming the promisee does not prove in the bankruptcy.<sup>277</sup> Likewise the promisee enjoys the right to follow the property in the hands of recipients, if this is misapplied, save that the proprietary rights of the promisee are not enforceable against a *bona fide* purchaser for value without notice of legal title to the property who subsequently acquires the property from the promisor.<sup>278</sup>

**577. Security interests** The ability to acquire an equitable proprietary interest in future property lends itself to the creation of a wide-ranging security embracing future (additional or substituted) assets, the lender taking an equitable interest in a specific

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<sup>275</sup> *Holroyd v Marshall* (1862) 10 HLC 191, 209 and 211 (11 ER 999, 1006-1007) *per* Lord Westbury LC; *Re Lind* [1915] 2 Ch 345, 360 (Swinfen Eady L.J.); *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] A.C. 1, 32 (Lord Phillimore).

<sup>276</sup> See *Cotton v Heyl* [1930] 1 Ch 510 (Luxmoore J).

<sup>277</sup> In the view of Jessel MR in *Collyer v Isaacs* (1881) 19 Ch D 342, 351-352, the trust arises only because of equity's anticipation of the promisor's performance of the obligation to transfer; if the property has not been acquired before the promisor was declared bankrupt, that obligation will have been converted by the bankruptcy into a mere right to prove in the bankruptcy, i. e. a right to a creditor's dividend. Notwithstanding this, the Court of Appeal in *Re Lind* [1915] 2 Ch 345 determined that the lender acquires an equitable interest in the after-acquired property even if this is acquired after bankruptcy. The obligation of the promisor to provide future security does not appear to be released by the bankruptcy.

<sup>278</sup> *Joseph v Lyons* (1884) 15 QBD 280 (Court of Appeal), where a jeweller, who had agreed to transfer his after-acquired stock-in-trade as security for his borrowing, pledged a portion of subsequently acquired stock with a third party who, having no notice of the first lenders' rights, was entitled to retain that stock on the terms of the pledge. The first contracted conferred only an equitable interest on the lenders, whereas the jeweller enjoyed legal title to the stock which he was able to transfer by way of pledge to the second lender. See also *Clements v Matthews* (1883) 11 QBD 808 (Court of Appeal), where a lender who had taken an assignment of future crop from a tenant farmer was not entitled to the proceeds of sale as against a landlord who had accepted a surrender of the tenancy in lieu of arrears of rent and thus acquired legal title for valuable consideration. The case was decided on other grounds as the landlord had in fact acquired notice of the lender's equitable interest before completion of the surrender. In relation to intellectual property, see likewise *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] A.C. 1, 19 (Lord Finlay).

changing fund of business assets.<sup>279</sup> However, in relation to mortgages of after-acquired chattels effected by individuals,<sup>280</sup> such mortgages are void as against third parties<sup>281</sup> and, as regards the grantor, effectively precluded by the need to comply with the restrictive terms of the Bills of Sale legislation;<sup>282</sup> they can therefore be utilised only in respect of stock, things in action, intellectual property rights, and other property to which that legislation does not apply.<sup>283</sup> When executed by companies, undertakings to transfer future property given by way of security may constitute fixed or floating charges whose validity depends on registration under the Companies Act 1985.<sup>284</sup> Nor should it be overlooked that trust law principles may operate to add rigour (and protection against the assignee's creditors or third parties) to a bargained for assignment by way of security. Thus, for example, where a creditor, who has assigned his contractual right to a debt to a chargee by way of security, subsequently receives payment of that debt from the debtor, the assignor will hold that payment on constructive trust for the chargee.<sup>285</sup>

#### (d) Assignment, trusts of contractual rights and third party rights

**578. Voluntary assignment and trusts** As the preceding discussion has indicated, trust principles can form the basis for a form of bargained for assignment of the benefit of contractual rights. Equally, the trust device may be invoked by the holder of existing

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<sup>279</sup> See, for example, *Lazarus v Andrade* (1880) 5 CPD 318 (Lopes J). This type of security, taken to its extreme, is described in these terms by Lord Macnaghten in *Tailby v Official Receiver* (1888) 13 App Cas 528, 541: "It is a floating security reaching over all the trade assets of the mortgagor [...] and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. [...] The mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation."

<sup>280</sup> Debentures issued by incorporated companies are exempt from the Bills of Sale Act (1878) Amendment Act 1882: see s. 17.

<sup>281</sup> Bills of Sale Act (1878) Amendment Act 1882, s. 5.

<sup>282</sup> A bill of sale is void against a grantor unless it accords with a specified statutory form (Bills of Sale Act (1878) Amendment Act 1882, s. 9 and Sched.) which effectively requires an inventory of the goods. Compliance precludes a bill of sale of future chattels: see *Thomas v Kelly* (1888) 13 App Cas 506 (House of Lords), especially at 512 (Lord Halsbury LC), 517 (Lord FitzGerald).

<sup>283</sup> See Bills of Sale Act 1878, s. 4 (definition of "personal chattels"). However, as regards things in action, a general assignment of future book debts by a person engaged in a business who is subsequently adjudged bankrupt is void against the trustee in bankruptcy in respect of debts not then paid unless the assignment is registered under the Bills of Sale Act: Insolvency Act, s. 344.

<sup>284</sup> In England and Wales: Companies Act 1985, s. 395: see *The "Annangel Glory"* [1988] 1 Lloyd's LR 45 (Saville J) (in respect of future book debts). In the Republic of Ireland: Companies Act 1963, s. 99: see *Re Keenan Brothers Ltd* [1985] I.R. 401 (Supreme Court) (likewise in respect of future book debts).

<sup>285</sup> *Barclays Bank plc v Willowbrook International Ltd* (1987) Financial Times, 10th February (Court of Appeal), reversing (1985) Financial Times, 9th July (Walton J).

contractual rights to create a voluntary assignment of the benefit of those rights (i. e. one not bargained for) by a simple declaration that the rights are held on trust for the nominated beneficiary. This mode of disposition exists in parallel with that of a transfer of the legal rights by compliance with statutory formality requirements.<sup>286</sup> Here too, however, trust principles are capable of playing a role since a would-be assignor who has executed a formal assignment and handed this to the assignee, but not given notice to the debtor and thus failed to complete the transfer of his legal rights to the assignor,<sup>287</sup> may be regarded as holding his contractual rights on trust. This is on the basis that, since notice may be given by either the assignee or the assignor,<sup>288</sup> the would-be assignor will have done all that is necessary for him to do to effect a transfer.<sup>289</sup> In this fashion trust law fulfils an intricate supplementary function to the law governing the statutory mode of assignment. Furthermore, a declaration of trust of contractual rights may be invoked in circumstances where no assignment is possible – for example, because the contractual right is to the performance of a personal service or because assignment (but not a declaration of trust) is prohibited by the terms of the agreement.<sup>290</sup>

**579. Third party rights to enforce contracts and trusts of contractual rights** The complexity of interaction between trust law and contract law is underlined when one focuses on the rights of third parties to enforce a contract from whose performance they stand to benefit. Here too statute provides a general framework within contract law for third parties to acquire direct rights to enforce a contract according to the intention of the parties.<sup>291</sup> This field is likewise supplemented by trust law rules since it remains possible for a promisee to constitute himself a trustee of his contractual rights for the benefit of the third party concerned,<sup>292</sup> thus enabling the third party as beneficiary to enforce the contract (joining the promisee-trustee as a party to the litigation). The trust law rules complement the statutory rules in several ways. Whereas a direct statutory right of

<sup>286</sup> See Law of Property Act 1925, s. 136, requiring an assignment by signed writing and written notice to the debtor. The Supreme Court of Judicature (Ireland) Act 1877 contains the like provision.

<sup>287</sup> In relation to the debtor assignment is complete under the statutory provision only when the debtor has received notice: see *Re Westerton* [1919] 2 Ch 104, 111 (Sargant J).

<sup>288</sup> *Walker v Bradford Old Bank* (1884) 12 QBD 511, 517 (Smith J); *Bateman v Hunt* [1904] 2 KB 530, 538 (Stirling L.J.); *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, 4 (Atkinson J); *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295, 299F-G (Jenkins L.J.).

<sup>289</sup> Cf. *Mascall v Mascall* (1984) 50 P & CR 119 (Court of Appeal), concerning the transfer of registered land.

<sup>290</sup> *Don King Productions Inc. v Warren* [2000] Ch 291 (Court of Appeal, affirming Lightman J), concerning rights under boxing promotion and management contracts.

<sup>291</sup> See Contract (Rights of Third Parties) Act 1999. The Act applies in Northern Ireland as well as England and Wales. For the Republic of Ireland see the Married Women's Status Act 1957, s. 8, which applies in the comparatively narrow context of contracts for the benefit of a spouse or child of the contracting parties.

<sup>292</sup> By s. 7(1) of the 1999 Act there is an express saving for other rights or remedies of the third party existing independently of the Act which includes equitable rights arising under a trust of the contractual rights.

enforcement will be determined by interpretation of the contract as a feature of and at the time of its creation, turning on the mutual intentions of the parties, a trust of the contractual benefits may be created unilaterally by the promisee subsequent to as well as contemporaneously with the contract. The potential for a trust to arise will continue to be relevant where the statutory regime is expressly excluded.<sup>293</sup> Again, therefore, a complete picture of the private law rights generated by a contract in the common law legal systems depends on an appreciation of possible trust law rights; trust law principles may find application to bridge the crevices of the law of direct third party enforcement of contracts. In addition there is at least one significant case where a trust is imposed by statute to confer rights on a third party as a beneficiary under a trust of the contractual rights (rather than as if they were a party to the contract): this is where a life assurance or endowment policy is expressly for the benefit of the insured's spouse or children or purports to confer a benefit on them.<sup>294</sup>

#### (e) Trusts and contribution to financing property acquisition

**580. Agreements, contributions and trusts of acquisitions** A further area of law where contract law and trust law touch and may interact concerns the financing of property acquisition. A trust may be implied by the operation of legal rules where property is purchased by one party and another party has contributed to the purchase price.<sup>295</sup> In the absence of a declaration of trust governing the beneficial ownership of the property,<sup>296</sup> a resulting trust will arise if the financier has made a direct contribution which was not intended (or rebuttably presumed to be intended) to be a beneficial gift to the purchaser. The size of the financier's beneficial interest as a fraction of the whole equitable ownership will reflect the proportionate contribution to the total acquisition costs. Where the parties have reached some express but informal consensus on sharing the beneficial ownership (which is practically indispensable in the case of indirect contributions),<sup>297</sup> the quantum of equitable interest – under a constructive trust – acquired by the financier who has detrimentally relied on the agreement will be determined by the common intention of the parties. Both species of implied trust may be regarded as in effect reversing an unjustified enrichment of the property owner. Their

<sup>293</sup> See s. 6 of the 1999 Act, concerning *inter alia* negotiable instruments, employment contracts and the carriage of goods.

<sup>294</sup> See Married Women's Property Act 1882, s. 11, and in the Republic of Ireland the Women's Status Act 1957, s. 7.

<sup>295</sup> The exact nature of the requirements for the generation of a beneficial interest as well as the classification of the trusts are matters of debate and the following merely sketches out in rough and abbreviated form one mode of formulating the applicable principles. It should be noted that like principles apply where joint purchasers make unequal contributions to the purchase price. For simplicity's sake the discussion proceeds on the basis that one person contributes to another's acquisition of sole ownership.

<sup>296</sup> The beneficial ownership in the property acquired may be addressed and resolved by the instrument of transfer or a collateral declaration of trust: see *Pettitt v Pettitt* [1970] A.C. 777, 813E-F (Lord Upjohn).

<sup>297</sup> See *Lloyds Bank v Rosset* [1991] 1 A.C. 107, 133 (Lord Bridge).

chief significance, however, is to confer a proprietary interest, whose worth fluctuates with the value of the property, rather than a merely personal right to re-payment of the nominal sum contributed. That beneficial interest, moreover, may be enforceable against third parties who acquire the legal title to the property without giving value or with notice of the interest.<sup>298</sup> Critically the beneficiary's rights are unaffected by the property owner's bankruptcy and can be enforced against the latter's general creditors.

**581. Relationship to contract rules** These trust law principles are most commonly applicable in relation to home acquisition. This is so not least because the family home is for most individuals the most significant financial asset, the basis for accommodation and living, and often the subject for substantial secured lending; this may be cause enough for litigation where the relationship for which the home was acquired has broken down or default is made on a mortgage. The relation to contract law is most apparent in this context since a contract for the disposition of an interest in land – including a contract to allocate beneficial interests – is generally void unless executed in writing signed by both parties.<sup>299</sup> Thus trust law gives effect to an agreement which is ineffective as a contract in the circumstance in which it is acted upon by the parties.<sup>300</sup> The same interconnection arises where, aside from formality considerations, the agreement is ineffective as a contract because the parties do not intend to conclude a legally enforceable contract. While, as a matter of contract law, the parties' intention prevents either from having a right to performance, once partially executed the agreement may nonetheless generate proprietary consequences in terms of the trust law principles set out above.<sup>301</sup> Again, therefore, an appreciation of the relevant contract law alone gives an incomplete picture of the totality of private law rights since trust law invades the domain which contract law abdicates.

**582. Land and commercial assets** While this interconnection is most clearly illustrated in relation to land and in the context of family rather than commercial assets, the principles apply equally to other property and other contexts. Thus, for example, the proceeds of an insurance policy payable to a person nominated by the policy-holder may be subject to a resulting trust in favour of the policy-holder if the latter has undertaken to pay and paid the premiums due.<sup>302</sup>

<sup>298</sup> These principles are modified in relation to implied trusts of land.

<sup>299</sup> Law of Property (Miscellaneous Provisions) Act 1989, s. 2. In the Republic of Ireland, such contracts must be evidenced by writing signed by the party to be sued: Statute of Frauds (Ireland) 1695, s. 2. In the latter case the consequence of non-compliance with the statutory formality is merely to render the contract unenforceable and not to affect its validity as such.

<sup>300</sup> The agreement is also ineffective as an express declaration of trust, since this must be evidenced by signed writing to be enforceable: Law of Property Act 1925, s. 53(1)(b). However, this formality requirement does not restrict the creation or operation of resulting or constructive trusts: s. 53(1)(c) and see also the Law of Property (Miscellaneous Provisions) Act 1989, s. 2(5) for the like saving in respect of the formality for a contract. For the Republic of Ireland, see (with corresponding effect) the Statute of Frauds (Ireland) 1695, s. 4.

<sup>301</sup> The point is clearly acknowledged in *Pettitt v Pettitt* [1970] A.C. 777, 822C-E (Lord Diplock).

<sup>302</sup> *Re a Policy No. 6402 of the Scottish Equitable Life Assurance Society* [1902] 1 Ch 282 (Joyce J).

**583. Loans and contributions** The connection of these trust law rules on implied trusts to the contractual context is further bound by the need to refer to the existence of any particular agreement concerning the form the contribution will take. In order for the trust law rules to operate the contribution must be an outright one; it is established that no beneficial interest will generally be acquired from a contribution which is made by way of a loan.<sup>303</sup> However, although a loan by itself is not enough to generate an equitable interest in property which it is used to acquire (or whose acquisition costs are offset by the money) it would seem that a loan can give rise to a beneficial interest in property if (i) there was a common intention of provider and recipient that contributions of the provider would generate a beneficial interest in the recipient's property, (ii) the provider has made other (outright) contributions and (iii) the loan assumes the character of an outright contribution in that the lender foregoes (interest due and) to claim repayment.<sup>304</sup> The proposition may be criticised on the basis that it effectively enables the lender to unilaterally re-structure legal relations with the borrower (potentially to the former's benefit and the latter's disadvantage, if property values have risen), turning a loan into a property investment, provided the lender has made some other direct contribution to acquisition and the parties contemplated the lender having some beneficial interest. Assuming it to be good law, however, it indicates that loans and acquisition of beneficial interests in property may interact in subtle fashion and the transformation of one legal arrangement into another may be effected on an informal basis. This is further confirmation that the boundaries between contract and trust are fluid. In any event the existence of a particular contract affecting the transfer of money or other contribution made and the exercise or non-exercise of particular contractual entitlements relating to that contribution may have repercussions for the existence of a trust of the property acquired and the quantification of beneficial entitlements.

## (6.) Obstacles to Cross-border Trusteeship of Movable Assets in Common Law Trusts

### (a) Particular problems in a wider problematic context

**584. Overview** As the introduction has already implied, the absence of a single close parallel institution to the trust in civil law systems and the private law difficulties in the operation of common law trusts abroad conduce generally to an inertia as regards the cross-border movement of trust patrimony (capital and goods). The analysis of two specific features of trust law – the ability of interested parties to call on the court's trust jurisdiction in the administration of trusts and the restriction of trustee powers of investment – provide further particular reasons why trusts may remain confined to their domestic setting. This is compounded by considerations of trust law which restrict the involvement of non-resident trustees or, in comparative terms, render their use disad-

<sup>303</sup> *Spence v Brown* (1988) 18 Fam Law 291 (Court of Appeal); *Risch v McFee* (1991) 61 P & CR 42, 46 *per* Balcombe L.J. (giving the judgment of the Court of Appeal).

<sup>304</sup> *Risch v McFee* (1991) 61 P & CR 42 (Court of Appeal), where the loan was made to enable an owner to buy out a third party's beneficial interest.

vantageous and so effectively diminish the scope for the provision of cross-border services in the form of trusteeship out of the jurisdiction. Hence the rules on appointing non-resident trustees and the position of non-resident corporate trustees is given particular attention here. In respect of trusts of movable assets which would be transferred to trustees abroad if trust administration re-located, these various considerations necessarily intertwine with particular strength.

**585. Express private trusts and statutory trusts** The following examination of selected areas of particular difficulty concentrates on the predicament of express private trusts in their cross-border engagement. However, it should be noted that further particular difficulties may also arise in relation to statutory trusts arising in specific contexts. For example, in respect of statutory trusts ancillary to contractual arrangements, it may be that questions of discrimination feature as regards capital investments destined for domestic application and those actuated for overseas purposes. A case in point is the statutory trust of client money received by an estate agent in the course of his work in England, Wales or Northern Ireland applies only to deposits in respect of the acquisition of land in the United Kingdom. A deposit taken in the course of business in respect of a contract for a French property, by contrast, would be subject to general legal principles and, unless an express trust is agreed, could well be construed as a mere contractual stake holding<sup>305</sup> which would confer considerably less protection on the client depositor in the event of the estate agent's bankruptcy or misapplication of the funds. In the context of increased cross-border marketing and acquisition of properties, such differential treatment within the realm of statutory trusts between domestic and cross-border investment may be regarded as discriminatory and involves appreciable risk for the unwary.

**(b) Assistance and intervention of the court**

**586. Position in the common law and Scotland** The generous assistance provided by courts to trustees under the common law systems (or, conversely, the more slender aid available elsewhere) may provide cause for trusts in their administration and choice of law to 'cling' to a traditional trust jurisdiction. As a general principle, a trustee who, confronted with the terms of the trust and the applicable rules of law, is in doubt as to what his duty is can apply for the directions of the court and can then safely administer the trust on the basis of the court's order.<sup>306</sup> If there is real difficulty in administering the trust, a trustee has the further right to apply for administration of the trust by the court and to be discharged from office.<sup>307</sup> In the United Kingdom this assistance has been developed both in respect of enabling the modification of the trust and in protecting trustees. A court has statutory power to confer on trustees powers for the purpose of

<sup>305</sup> See above.

<sup>306</sup> *Marley v Mutual Security Merchant Bank* [1991] 3 All ER 198, 201 (Lord Oliver for the Judicial Committee of the Privy Council). As to the English procedure, see the Civil Procedure Rules Part 64, Section 1, and Practice Direction 64B. For Scotland, see the Court of Session Act 1988, s. 6(vi) and the Rules of the Court of Session, Chapter 63 Part 2.

<sup>307</sup> As to the English procedure, see the Civil Procedure Rules Part 64, Section 1, and Practice Direction 64.

concluding a property transaction where that is expedient and the trustees otherwise lack an appropriate power.<sup>308</sup> The court is also able to give consent to a variation of trusts on behalf of unborn or incompetent persons.<sup>309</sup> For the protection of trustees, by statute Scottish law specifically enables trustees to apply to the court for a superintendence of their investment and distribution of the trust funds,<sup>310</sup> while English law authorises a trustee (or beneficiary) to apply for an investigation and audit of the condition and accounts of the trust.<sup>311</sup> A right to pay trust funds into court and thus to be relieved of the burden of its future administration may also arise.<sup>312</sup> Furthermore, the court may relieve a trustee from liability for breach of trust in the exceptional circumstances where the trustee acted honestly and reasonably and ought fairly to be excused for the breach of trust and failure to obtain the directions of the court.<sup>313</sup>

**587. 'Self-help' structures in other jurisdictions** In non-trust jurisdictions a trustee is not necessarily able to obtain the assistance, directions and protection of a court in comparable manner. To compensate parties may agree that the 'trustee' may be protected if he acts in good faith in accordance with a legal opinion.<sup>314</sup> This is only a partially satisfactory solution: the opinion might be subject to review in the courts, but it may not be open to appeal in the more flexible and immediate way that the decision of a court may be challenged. Nor will such decisions necessarily have the same publicity and the like weight and influence as may attach to a reported judicial assessment of a given case. For that reason trustees in comparable cases will not enjoy the externalised benefits of the dispute resolution in terms of the clarification of doubtful points about the limits of trustee competences or the relevance of particular considerations to the exercise of

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<sup>308</sup> Trusts (Scotland) Act 1921, s. 5; Trustee Act 1925, s. 57(1); Trustee Act (Northern Ireland) 1958, s. 56(1). In the Republic of Ireland, following English case law it is thought that the courts probably enjoy only a very limited inherent jurisdiction to confer powers of administration in connection with emergencies which could not reasonably have been foreseen, which must be addressed forthwith and for which the consent of the beneficiaries cannot be obtained.

<sup>309</sup> Variation of Trusts Act 1958, s. 1; Trustee Act (Northern Ireland) 1958, s. 57; Trusts (Scotland) Act 1961, s. 1.

<sup>310</sup> Trusts (Scotland) Act 1921, s. 17.

<sup>311</sup> Public Trustee Act 1906, s. 13; Trustee Act 1925, s. 22(4).

<sup>312</sup> Trustee Act 1925, s. 63.

<sup>313</sup> Trusts (Scotland) Act 1921, s. 32 (without the second limitation); Trustee Act 1925, s. 61; Trustee Act (Northern Ireland) 1958, s. 61.

<sup>314</sup> Cf. Simons and Radicati, "A Trustee in Continental Europe: The Experience of the Bank for International Settlements", p. 338. It may be noted as regards English law that under s. 48 of the Administration of Justice Act 1985, the High Court may make an order on the application of trustees and without hearing argument authorising steps in reliance on a legal opinion in writing by a person having a ten year High Court qualification. However, this power is limited to matters of construction of the trust: s. 48(1)(a). Moreover, it cannot be exercised if there is a dispute which makes it inappropriate to make the order without hearing argument: s. 48(2). Crucially, the court is not obliged to endorse the legal opinion, the provision being merely permissive. Thus structurally as well as dogmatically decision rests with the court.

trustee powers or the fulfilment of their duties. Moreover, in order to provide an approximate equivalent to a decision of judicial status, any such clause must be enlarged by the requirements of (i) neutrality (as between the parties) of the provider of the opinion, (ii) the opportunity of all interested parties (including incapable parties for whom representation must be provided) to make submissions, and (iii) the senior or expert status of the person charged with providing the opinion.

(c) Appointment of trustees resident abroad

**588. Reasons for transfer to trustees abroad** Though undoubtedly material,<sup>315</sup> it should not be assumed that the primary reason for transfer of trust administration from one jurisdiction to another is necessarily the furtherance of tax avoidance or the minimisation of tax liabilities. The reported cases indicate that a primary reason is one of convenience – the proximity of the trust administration to the beneficiaries by moving it to the country of residence of the beneficiaries and the avoidance of unnecessary duplication of trust administration.<sup>316</sup> That is clearly an important consideration in the context of increased free movement of persons within the EU. One particular inconvenience of cross-border administration is the risk of fluctuations in exchange rates which may affect the practical worth of the financial disbursements to the beneficiaries.<sup>317</sup> A further economic reason for transfers of trust funds across borders has been a desire to take up more profitable investment opportunities.<sup>318</sup>

**589. Common law: basic stance on appointment of foreign trustees** There is no rule of law which precludes the appointment of foreign trustees of English (or as the case may be Irish)<sup>319</sup> trusts where the assets are to remain within the jurisdiction: both powers of appointment contained in trust instruments<sup>320</sup> or conferred by statute<sup>321</sup> on settlors or

<sup>315</sup> Minimisation of tax liability was, for example, an additional factor motivating the application in *Coat's Trustees*, 1925 SC 104.

<sup>316</sup> The latter was the motive for the petition in *Lloyd's Petition*, 1963 SC 37, where there were parallel Scottish and English trust funds with identical trustees.

<sup>317</sup> So much is implied in *Coat's Trustees*, 1925 SC 104, 107.

<sup>318</sup> See, for example, the Scottish cases *Stewart's Trustees*, 1913 SC 647, 648, where the wish of the beneficiaries was frustrated by the Court of Session's decision that a transfer to a Canadian corporate trustee should not be permitted, and *Coat's Trustees*, 1925 SC 104, 106, where the prospect of larger yields was an additional reason for re-location of the trust administration.

<sup>319</sup> The case law cited is predominantly English, but it is not thought that the principles are substantially different in the Irish jurisdictions. For a reported decision involving a trust constituted under Northern Irish law with non-resident trustees, see *Vestey v IRC* [1979] Ch 177 (Walton J), affirmed [1980] A.C. 1148 (HL).

<sup>320</sup> Such a power may be either dependent on certain conditions arising – such as the unfitness or the incapacity of a trustee to act – or phrased in wide terms, for example so as to enable an appointment whenever the donee of the power considers it expedient. The latter is more usual: see *Delany*, p. 383.

<sup>321</sup> In addition to any express power contained within the trust instrument, a power to appoint replacement trustees is conferred on (surviving) trustees by legislation: see Trustee Act 1925, s.

trustees<sup>322</sup> and inherent<sup>323</sup> or statutory<sup>324</sup> judicial powers<sup>325</sup> may be exercised so as to appoint trustees out of the jurisdiction. Where, moreover, the contemplated appointment of foreign trustees (or correspondingly the contemplated transfer of English trust property to foreign trustees to be held on the terms of a foreign trust law)<sup>326</sup> is to be effected by trustees under the exercise of their powers under the trust instrument, the court need not establish for itself the merits of the appointment (or transfer) provided it is lawful: it suffices that the appointment or transfer is within the terms of the power, that the trustees are acting prudently and that it is evident that a trustee might properly consider the contemplated exercise of the power to be advantageous for the beneficiaries.<sup>327</sup> Only when the appointment or transfer is to be effected by order of the court under its statutory or inherent power must the court itself be satisfied on the merits that the power should be exercised in the manner proposed by the applicant.<sup>328</sup> However, the appointment of trustees resident outside the jurisdiction is regarded as exceptional, the general rule being that they should be resident in the jurisdiction.<sup>329</sup> “[A]part from

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36(6) (England and Wales); Trustee Act 1893, s. 10 (Republic of Ireland); Trustee Act (Northern Ireland) 1958, s. 35.

<sup>322</sup> *Meinertzhagen v Davis* (1844) 1 Coll 335, 63 ER 444 (Knight Bruce VC); *Re Smith's Trusts* [1872] WN 134 (Lord Romilly MR); *Re Whitehead* [1971] 1 W.L.R. 833, 837A-B, 838D-E, 839D (Pennycuik VC), deciding (at 839C) that s. 36 of the Trustee Act 1925 does not imply that a person resident outside the United Kingdom is ineligible for appointment as a trustee; *Lewin on Trusts*, § 14-36.

<sup>323</sup> An inherent judicial power to appoint trustees exists where (i) the instrument declaring and constituting a testamentary trust has failed to nominate trustees (*Dodkin v Brunt* (1868) LR 6 Eq 580 (Malins VC); for Irish law, see *Pollock v Ennis* [1921] 1 I.R. 181 (Powell J)) or (ii) nominated trustees have died before the trust instrument has come into effect or (iii) trustees have refused to act.

<sup>324</sup> A statutory power to appoint trustees is conferred on the court when it is expedient for the court to make an appointment and an appointment without the court's assistance would be inexpedient, difficult or impracticable: Trustee Act 1925, s. 41; Trustee Act (Northern Ireland) 1958, s. 40; Trustee Act 1893, s. 25 (Republic of Ireland).

<sup>325</sup> *Re Hill's Trusts* [1874] WN 228 (Malins VC); *Re Drewe's S.T.* [1876] WN 168 (Malins VC); *Re Cunard's Trusts* (1879) 48 LJ Ch (N.S.) 192 (Malins VC); *Re Austin's Settlement* (1878) 38 LT (NS) 601 (Malins VC); *Re Liddiard* (1880) 14 Ch D 310 (Malins VC); *Re Freeman's S.T.* (1887) 37 Ch D 148 (Stirling J); *Re Simpson* [1897] 1 Ch 256 (Court of Appeal, reversing North J). For Irish law, see similarly *Re Curtis's Trust* (1871) I.R. 5 Eq 429 (Sullivan MR) where beneficiaries resident in England were appointed trustees of Irish land, and *Crofton v Crofton* (1913) 47 ILTR 24 (O'Connor MR), where an English resident trustee of an Irish trust was appointed.

<sup>326</sup> *Richard v Mackay* (1987) (1997) 11 Tru LI 22 (Millett J), where the trustees were held to be within their powers in removing one quarter of the trust fund overseas.

<sup>327</sup> *Richard v Mackay*, *op. cit.*, 24-25, approved in *Re Beatty's W.T. (No. 2)* (1991) (1997) 11 Tru LI 77, 79 (Vinelott J).

<sup>328</sup> *Ibid*, 24, approved in *Re Beatty's W.T. (No. 2) op. cit.*, 79 (Vinelott J). The same contrast was drawn in *Re Guibert* (1852) 16 Jur 852, 853 (Romilly MR).

<sup>329</sup> *Meinertzhagen v Davis* (1844) 1 Coll 335 at 345, 63 ER 444 at 449 (Knight Bruce VC) (where, however, the appointment of non-resident trustees and transfer of moveable trust assets out of

exceptional circumstances, it is not proper to make such an appointment, that is to say, the court would not, apart from exceptional circumstances, make such an appointment; nor would it be right for the donees of the power to make such an appointment out of court.”<sup>330</sup>

**590. Necessity for a good reason** A power to appoint trustees may thus only be exercised to appoint foreign trustees where there is good reason to do so or, as the case may be, the trustees may properly consider there is good reason.<sup>331</sup> The quintessential reason for doing so is because all or predominantly all of the beneficiaries are resident (on an established rather than a transitory basis)<sup>332</sup> in some other jurisdiction and it will be for their mutual convenience and advantage if the assets are owned by trustees resident in that jurisdiction.<sup>333</sup> Where almost all the beneficiaries are resident abroad, and the only

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the jurisdiction was upheld as valid); *Re Drewe's S.T.* [1876] WN 168 (Malins VC) (where, however, the particular circumstances of the case justified a departure from the general rule); *Re Freeman's S.T.* (1887) 37 Ch D 148, 151 (Stirling J) (where, exceptionally, foreign trustees were appointed, though subject to their undertaking not to appoint a further foreign trustee without the court's consent if the sole resident trustee died); *Re Simpson* [1897] 1 Ch 256, 259 (Lindley L.J., giving the judgment of the Court of Appeal); *Lewin on Trusts*, §§ 14-36 and 15-07; *Ronan Keane*, *Equity and the Law of Trusts in the Republic of Ireland* (1988), para. 9.11 (persons resident out of the jurisdiction will not be appointed, save in special circumstances); *Delany*, p. 382 (“It is preferable that the trustees appointed reside in the jurisdiction but in special circumstances an exception may have to be made.”). The point is also implicit in *Re Austin's Settlement* (1878) 38 LT (NS) 601, 602, where Malins VC notes that in appointing trustees in Ireland he was departing from “the usual rule” on account of the special circumstances of the case.

<sup>330</sup> *Re Whitehead* [1971] 1 W.L.R. 833, 837B and similarly at 838D-E (Pennycuik VC). In the Irish case *Crofton v Crofton* (1913) 47 ILTR 24 O'Connor MR stressed that he appointed a trustee resident in England because of the special circumstances of the case, an infant beneficiary having no one else to look after his interests. *Lewin on Trusts*, § 15-07 and 45-52, asserts that the circumstances in which a court might be persuaded to appoint non-resident trustees (or vary trusts by changing the applicable law) may now be less narrow than past judicial authority indicates, but nonetheless affirms that the court will not do so unless there are “special circumstances” rendering it advisable.

<sup>331</sup> *Delany* expresses the rule in more stringent terms: a court may sanction the appointment of persons resident outside the jurisdiction “where there is no practical alternative”: *Delany*, p. 382.

<sup>332</sup> Contrast *Re Windeatt's W.T.* [1969] 1 W.L.R. 692 (where the beneficiaries had made a “genuine and permanent home” in Jersey and the appointment of Jersey trustees for a Jersey trust was approved) with *Re Weston's Settlements* [1969] 1 Ch 223 (where the beneficiaries had been resident in Jersey only a matter of months, had no other ties to the island and neither at first instance nor on appeal was the court satisfied that the beneficiaries had an intention to continue to live there).

<sup>333</sup> *Re Whitehead* [1971] 1 W.L.R. 833, 837C, 838D-E (Pennycuik VC), where this “most obvious” or “outstanding” (and by inference non-exhaustive and merely illustrative) ‘exceptional circumstance’ was the basis of the decision. It has also provided the basis for the decision in the

UK resident beneficiary does not object, the trustees or the court may appoint trustees resident in a suitable overseas jurisdiction.<sup>334</sup> It has been noted that with the enormous improvement in (inexpensive) international communications in recent decades, the administrative advantages in having the trust administered where the beneficiaries are resident is likely to carry less weight in future.<sup>335</sup> Conversely it may equally be said that where trustees are appointed outside the UK – and especially if they are resident in another member state – the administrative inconvenience of cross-border trust administration is correspondingly slender and may be more than compensated by, for example, more competitive and efficient administration of the trust fund. Other reasons which have convinced the courts that there is or at least may properly be thought to be good reason for overseas re-settlement of English trust funds include the need for diversification and flexibility in large family settlements with varied international connections (albeit that the beneficiaries are not substantially resident abroad at the time).<sup>336</sup> By contrast, mere tax advantage is not a sufficient ground – at any rate where the court is called upon to exercise its powers.<sup>337</sup> However, as the following text indicates, there are juridical obstacles to cross-border administration of English trusts.

**591. Bias against transfer of jurisdiction** The court is – or it any rate historically has been<sup>338</sup> – reluctant to appoint persons resident out of the jurisdiction where there is a substantial risk of a transfer of the trust assets abroad which might then subject them to

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other cases cited in the preceding notes. See further *Re Austin's Settlement* (1878) 38 LT (NS) 601 (Malins VC) (all the interested parties resident in Ireland); *Lewin on Trusts*, § 14-37.

<sup>334</sup> See *Re Beatty's W.T. (No. 2)* (1991) (1997) 11 Tru LI 77 (Vinelott J) where the trustees were considered authorised to appoint Jersey resident trustees for the advantage of the principal beneficiary (living in Australia) and another beneficiary who planned to live in Spain, the third and permanently UK resident beneficiary not objecting to the relocation of the trust. A court might now be prepared to make an appointment in such circumstances in its own right: *Lewin on Trusts*, p. 377 n 29.

<sup>335</sup> *Lewin on Trusts*, § 14-37.

<sup>336</sup> See *Richard v Mackay* (1987) (1997) 11 Tru LI 22.

<sup>337</sup> *Richard v Mackay* (1987) (1997) 11 Tru LI 22, 24, approved in *Re Beatty's W.T. (No. 2)* (1991) (1997) 11 Tru LI 77, 79 (Vinelott J).

<sup>338</sup> In *Richard v Mackay* (1987) (1997) 11 Tru LI 22, 24-25 Millett J implies that the language in *Re Whitehead's W.T.* may be “too restrictive for the circumstances of the present day” and out of date – especially in the context of a settlement for an international family with international interests (and, presumably, even more so in relation to commercial trusts). That view was endorsed in *Re Beatty's W.T. (No. 2)* (1991) (1997) 11 Tru LI 77, 79 by Vinelott J. It may well be that the governing principles have remained the same, but a more generous judicial attitude should be expected as regards their *application*. Thus, for example, the refusal in *Re Long's Settlement* (1868) 38 LJ Ch (N.S.) 125 (Malins VC) to permit a transfer of the residue of a trust fund to new trustees in New Zealand, where the beneficiaries were to take up residence, on the basis there was no evidence the trust fund would be benefited by a change of investment would hardly be followed now. It is implicit in *Re Weston's Settlements* [1969] 1 Ch 223 that a prospective change of residence for the beneficiaries can suffice as a legitimate reason for a transfer of the trust provided that change is genuine and expected to be reasonably permanent.

foreign law instead of English law.<sup>339</sup> The policy of the law is that English trusts should remain so unless some good reason connected with the trusts can be put forward for their removal to another jurisdiction.<sup>340</sup> Where, on the other hand, the trust remains governed by English law because the assets remain within the jurisdiction, there may be a problem in enforcing the trust. That is of particular concern if it could be necessary for trust proceedings to be undertaken in a foreign court – potentially an extremely inconvenient forum for administering a trust if that court would not apply English trust law and its own approach to the subject is fundamentally different.<sup>341</sup> For reasons such as these it has been the general attitude of English courts that “the court is unwilling to appoint trustees in such a way that all the trustees are out of the jurisdiction, more particularly if the property is likely to be taken out of the jurisdiction.”<sup>342</sup> Where a transfer of funds to trustees overseas was permitted, earlier practice at least (as in Scotland: see below) was to insist on an undertaking from the trustees to apply the funds in accord with the trust.<sup>343</sup> A ‘divorce’ of assets and trustees from the trust enforcing jurisdiction is regarded (at any rate judicially) as a generally unsatisfactory state of affairs.<sup>344</sup> Moreover, while an ap-

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<sup>339</sup> See *Re Freeman’s S.T.* (1887) 37 Ch D 148, 151 where Stirling J, in appointing the Canadian trustees, noted that the trust assets being land they could not be removed out of the jurisdiction in the absence of a power to sale and convert them into movables. That this judicial stance was not eradicated by the subsequent century of legal development is evident from Harman L.J.’s rhetorical interjection in *Re Weston’s Settlements* [1969] 1 Ch 223, 239A-B regarding the relevance of the fact that “the settlor was born and made his fortune in England and settled the property on English trusts so that prima facie they belong here and special reasons are required for removing them elsewhere”. See also *Re Lloyd*, summarised below.

<sup>340</sup> Cf. *Re Weston’s Settlements* [1969] 1 Ch 223, 248B-C (Harman L.J.).

<sup>341</sup> See Brunyate’s argument in *Re Seale’s Marriage Settlement* [1961] Ch 574, 577. It was therefore of importance for the decision in *Re Whitehead* [1971] 1 W.L.R. 833 appointing Jersey resident trustees that there was accepted evidence that a Jersey court would apply English law to the trust and could adequately protect the beneficiaries: see *ibid.*, 836H. It is also notable, for example, that virtually all of the older cases cited involved the appointment of trustees resident in other common law jurisdictions where it could likewise be expected that the relevant foreign courts would have no fundamental difficulty in applying the English law of trusts. The same rationale also holds for the appointment of trustees in Ireland in *Re Austin’s Settlement* (1878) 38 LT (NS) 601 and Pearson J’s contemplation of the appointment of trustees in the USA: see *Re Lloyd*. More recent cases are no different: in *Richard v Mackay* (1987) (1997) 11 Tru LI 22 the fact that Bermuda offers “an English system of law” with a trust law similar to and based on English law was an essential reason for choosing it as the jurisdiction for the seat of a settlement. The notable exception is *Re Hill’s Trusts* [1874] WN 228 (Malins VC). In that case – out of pure necessity – trustees were appointed in France, where the beneficiaries were resident, because no persons resident in England were prepared to act as trustees. By contrast no such appointment was made in *Re Guibert* (1852) 16 Jur 852, 853 (Romilly MR), despite the fact that the trust contained a power to invest in French investments and the beneficiaries were resident there.

<sup>342</sup> *Re Seale’s Marriage Settlement* [1961] Ch 574, 580 (Buckley J).

<sup>343</sup> *Re Robinson* [1931] 2 Ch 122, 129-130 (Maugham J).

<sup>344</sup> See *Re Seale’s Marriage Settlement* [1961] Ch 574, 580 (Buckley J).

pointment of trustees resident in a “non trust jurisdiction” is not definitively precluded, the necessity to ensure that the beneficiaries are adequately protected will mean that such an appointment – which exposes the beneficiaries to the risk that their trust rights are unrecognised and effectively unenforceable in the trustees’ jurisdiction – will rarely be justifiable.<sup>345</sup>

**592. Transfer of jurisdiction in the course of trust variation** The same<sup>346</sup> principles apply when the court is considering directing a transfer of assets to a trustee outside the jurisdiction so as to subject the trust to a foreign law in the exercise of a statutory<sup>347</sup> judicial power to vary the trust<sup>348</sup> – equivalent to a judicial exercise of the power to revoke the English trust and re-constitute it under the foreign law.<sup>349</sup> Such an exercise assumes more than simply the basis for the judicial power to vary the trusts.<sup>350</sup> For any such transfer out of the jurisdiction to be possible it will be necessary for the parties to present trust terms which substantially reproduce the beneficial interests granted by the English trust,<sup>351</sup> albeit that there may not be an absolute requirement that the allocation of benefit must be in all regards identical.<sup>352</sup> That in turn presupposes that the foreign

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<sup>345</sup> Cf. *Lewin on Trusts*, § 14-39.

<sup>346</sup> A court’s exercise of its jurisdiction does not differ depending on whether it is merely concerned with the appointment of foreign trustees or is contemplating a variation of the trust terms under statutory power: see *Re Whitehead* [1971] 1 W.L.R. 833, 837A-B, 838E (Pennycuik VC). Although the power to vary trusts by authorising their revocation, transfer of the trust assets to trustees outside the jurisdiction and subjection of the assets to foreign trusts was not exercised in *Re Weston’s Settlements* [1969] 1 Ch 223, both Stamp J (*ibid*, 230F-G) and the Court of Appeal assumed that the court had jurisdiction to do so.

<sup>347</sup> Variation of Trusts Act 1958, s. 1.

<sup>348</sup> There is apparently no *inherent* power of the court in the absence of the consent of all interested beneficiaries to authorise what would in effect precipitate a change in the law applicable to the trust: cf. *Re Lloyd* (1886) 54 LT (NS) 643 (Pearson J) where an application for transfer of the proceeds of sale of Welsh land to executors in America for investment there was refused (despite the fact the principal beneficiary was resident in America) because there was no effective consent forthcoming from minors who were contingently entitled to benefit, but the court contemplated that an appointment of the intended recipients as trustees to hold in accordance with the English settled land legislation would have been permissible.

<sup>349</sup> See *Re Seale’s Marriage Settlement* [1961] Ch 574, 579 (Buckley J), where the statutory power was exercised to transfer funds settled in England to a trustee in Ontario to be held subject to the terms of a trust governed by the law of Quebec.

<sup>350</sup> An exercise of the judicial power requires that the beneficiaries, so far as legally capable, are in agreement that this move is advantageous and, so far as incapable, that the court gives its approval on their behalf on the basis the arrangement is for their benefit: see Variation of Trusts Act 1958, s. 1.

<sup>351</sup> In *Re Windeatt’s W.T.* [1969] 1 W.L.R. 692, 695D-E Pennycuik J was satisfied that the corresponding settlement drawn up on the basis of Jersey law would enable the trust property to be held on trusts “in all relevant respects” the same as the existing English trusts.

<sup>352</sup> Deviations which touch contingencies (as opposed to the basic duration of interests) are apparently capable of being disregarded. Thus the fact that the law of Quebec did not

jurisdiction into which the trust is to be re-settled has a trust law regime sufficiently comparable so as to enable an approximately equivalent trust instrument to be drawn up.<sup>353</sup> The reported cases concerning transfer of jurisdiction are invariably cases of removal to another trust (though not necessarily common law) jurisdiction.<sup>354</sup> Furthermore, the proposed transaction must not be such as would deprive the beneficiaries of appropriate protection from a court armed with the necessary powers.<sup>355</sup> As a bare minimum this requires that the foreign legal regime is stable and that there are no restrictions on the free movement of capital<sup>356</sup> – conditions which all EU jurisdictions would easily satisfy. However, this requirement also involves more demanding elements which impliedly exclude a transfer to any jurisdiction lacking a legal construct comparable to the common law trust since a purely (or primarily) contractualised conception of the trust does not provide the beneficiary with an equivalent (quasi-)proprietary protection in relation to third parties such as personal creditors of the trustee. Such jurisdictions are excluded for the further reason that, lacking a comparably developed trust law, the powers of the court to intervene in trust matters are markedly slim when contrasted with those available in all parts of the United Kingdom and in the Republic of Ireland. There is no doubt that even in this regard English law has remained unchanged: in jurisdictions such as France where common law style trusts are not recognised, beneficial interests in a trust fund are regarded as being “at risk”.<sup>357</sup>

**593. Similar stance in the law of Scotland** The Scottish legal position on appointment of non-resident trustees is comparable to that in England and Wales.<sup>358</sup> Residence abroad is

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recognise protective trusts did not prevent a permissible transposition of the English trust in *Re Seale's Marriage Settlement*, notwithstanding that the husband's life interest in that case would cease to be determinable in the event of his bankruptcy.

<sup>353</sup> Cf. *Lewin on Trusts*, § 45-52, referring to a “jurisdiction with suitable experience of trust administration and a similar trust law to that of England”.

<sup>354</sup> In *Re Weston's Settlements* [1969] 1 Ch 223, 235B, counsel for the unsuccessful appellant conceded that there was no known case of a transfer to a jurisdiction which does not know the law of trusts. In *Re Seale's Marriage Settlement* [1961] Ch 574 the trustee was based in the common law jurisdiction of Ontario and the governing law of the trust (Quebec) was that of a civil law jurisdiction which has integrated the trust concept into its legal system. In *Re Windeatt's W.T.* [1969] 1 W.L.R. 692 Pennycuik J approved a variation whereby the governing law of the trust effective on transfer of the trust assets to Jersey resident trustees was to be the law of Jersey. At the time there might well have been doubts as to whether Jersey courts were sufficiently adapted to give effect to trusts in a manner fully comparable to those taking effect under an English trust: see observations to that effect in *Re Weston's Settlements* at 233E (Stamp J), 247F-G (Harman L.J.). However, the modern legal view is that Jersey provides a stable jurisdiction where the future administration of a trust will be safeguarded: *Re Beatty's W.T. (No. 2)* (1991) (1997) 11 Tru LI 77, 80 (Vinelott J).

<sup>355</sup> Implicitly: *Richard v Mackay* (1987) (1997) 11 Tru LI 22, 25 (Millett J).

<sup>356</sup> *Ibid.*, 25.

<sup>357</sup> See *Re Beatty's W.T. (No. 2)* (1991) (1997) 11 Tru LI 77, 80 (Vinelott J).

<sup>358</sup> For statutory powers to appoint trustees, see *Trusts (Scotland) Act 1921*, s. 3(b) (conferring power on trustees) and ss. 21-22 (conferring power on the courts). In addition the court has an

not as such a bar to trusteeship of a Scottish trust.<sup>359</sup> However, a withdrawal of the trust from Scottish jurisdiction is likewise considered an exceptional case<sup>360</sup> which must be justified by “very weighty reasons”.<sup>361</sup> Scottish courts will sanction appointments which result in a transfer of the effective control of the trust administration to another jurisdiction if the expediency of that course is established and all beneficially interested parties are adult and concur in the transfer.<sup>362</sup> In particular, an appointment of trustees resident in another jurisdiction and a transfer of funds to those trustees will be sanctioned if all the beneficiaries are resident there too.<sup>363</sup> Furthermore, a transfer to another jurisdiction may be authorised under statutory power to vary the terms of a trust<sup>364</sup> so as to permit a re-constitution of the trust elsewhere, the court giving its consent on behalf of beneficiaries who are under age or otherwise lacking capacity to consent or who have contingent interests and are presently unascertainable.<sup>365</sup>

**594. Bias towards other trust jurisdictions** The reported case law, however, confirms this practice only in relation to prospective trustees resident in jurisdictions where the common law model of the trust is established and enforced by the courts.<sup>366</sup> Moreover, the practice of the courts has previously been to demand an undertaking from the trustees to submit to the Scottish jurisdiction.<sup>367</sup> That further requirement seems no longer to be necessary on the grounds that such an undertaking is of doubtful practical worth<sup>368</sup> and at odds with a complete transfer of jurisdiction.<sup>369</sup> On the other hand, even the legitimacy of authorising the ‘export’ of trusts within these restrictions has been doubted in at least one reported instance by Scottish courts precisely on this ground of

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inherent power, exercised as part of its *nobile officium*, by virtue of its general jurisdiction over the administration of Scottish trusts.

<sup>359</sup> *W.A. Wilson and A.G.M. Duncan, Trusts, Trustees and Executors*<sup>2</sup> (1995), para. 18-16; *Stair* (1989), Vol. 24, para. 137.

<sup>360</sup> *Coat's Trustees*, 1925 SC 104, 106 per Lord Justice-Clerk Alness (‘prima facie startling’).

<sup>361</sup> *Ibid*, 108 per Lord Hunter. See also *Lloyd's Petition*, 1963 SC 37, 45 per Lord President Clyde (Court is not prepared to follow this course unless clearly warranted by the circumstances of the particular case).

<sup>362</sup> *Wilson and Duncan*, para. 21-14. See, implicitly to this effect, *Coat's Trustees*, 1925 SC 104, 107 (Lord Justice-Clerk Alness) and 108 (Lord Hunter).

<sup>363</sup> *Allardice* (1900) 8 SLT 6 (Lord Kincairney, Ordinary), where English trustees were appointed; *Simpson's Trustees*, 1907 SC 87 (Court of Session, 2nd Div.), where Canadian trustees were appointed; *Coat's Trustees*, 1925 SC 104 (Court of Session, 2nd Div.), where trustees in New York were appointed.

<sup>364</sup> Trusts (Scotland) Act 1961, s. 1.

<sup>365</sup> *Lloyd's Petition*, 1963 SC 37 (Court of Session, 1st Div.), where a revocation of Scottish trusts in favour of a like English trust with (identical) trustees resident in England was authorised. This was not the law prior to the 1961 Act: see *Stewart's Trustees*, 1913 SC 647 (Court of Session, 2nd Div.); *Coat's Trustees*, 1925 SC 104, 109 per Lord Anderson.

<sup>366</sup> See the preceding footnotes for details.

<sup>367</sup> See *Simpson's Trustees*.

<sup>368</sup> *Coat's Trustees*, 1925 SC 104, 107 (Lord Justice-Clerk Alness) and 109 (Lord Anderson).

<sup>369</sup> *Ibid*, 108-109 (Lord Hunter).

potential loss of jurisdiction to protect the beneficiaries.<sup>370</sup> Thus the Court of Session has refused to sanction the appointment of an overseas corporation as sole trustee on the ground that in the contrast to individuals who might come to be in Scotland from time to time a foreign corporation might never be within the power of the court and any undertaking to submit to its jurisdiction might be fundamentally worthless.<sup>371</sup> No doubt this latter view must be revised in the light of advancements in European private international law. The concern remains, however, that some barrier to modern commerce remains and the decision highlights a historic caution in the Scottish courts towards the transfer of trusts to other jurisdictions which has not been clearly dispelled by later decisions.

**595. Legal uncertainty and sub-optimal judicial powers** In this light of this case law the Scottish law on the appointment of non-residents as new trustees has been described as being in a somewhat indefinite and unsatisfactory position.<sup>372</sup> Historically applications for appointments of foreign trustees were unusual<sup>373</sup> and this paucity of judicial treatment in a previous social and economic age, when choice of residence was the privilege of a few, may be one reason why the law has not self-evidently kept pace with global economic integration. Matters are clearly less than optimal if a court considers it has no power to approve arrangements which are on any view convenient for the parties concerned.<sup>374</sup>

**596. Vulnerability of non-resident trustees to removal** Finally, it should be noted that while, in accordance with the foregoing, residence abroad is considered not to disqualify a person from holding office as a trustee and an appointment of a non-resident trustee is tolerated in given circumstances, the bias against trustees outside the jurisdiction is evident in that continuous residence outside of the United Kingdom for a given period renders the trustee vulnerable to removal (conceivably against their will). A trustee does not cease automatically to be a trustee by reason of continued absence from the United Kingdom.<sup>375</sup> Nonetheless, such residence abroad constitutes a ground for removal from office within the scope of the power granted to the trustees by statute, unless power to

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<sup>370</sup> See *Stewart's Trustees*, 1913 SC 647, 652 and 653, where Lord President Dunedin and Lord Johnston reserve their opinions as to the correctness of *Simpson's Trustees*.

<sup>371</sup> *Stewart's Trustees*, 1913 SC 647, 652 per Lord President Dunedin. A further reason for refusing to appoint the Canadian trustee was a concern that to do so would interfere with the (partial) English jurisdiction in respect of the settlement: *ibid*, 652. However, that objection might have been circumvented if the Court of Session had made its order allowing the transfer of administration to Canada conditional on an equivalent approval of an English court.

<sup>372</sup> *Wilson and Duncan*, para. 21-14.

<sup>373</sup> See *Coat's Trustees*, 1925 SC 104, 106 (Lord Justice-Clerk Alness).

<sup>374</sup> See especially the observation of Lord President Dunedin in *Stewart's Trustees*, 1913 SC 647, 653.

<sup>375</sup> *Thomson's Trustee*, 1948 SLT (Notes) 27 (Lord Mackintosh).

remove on that ground is expressly or impliedly excluded.<sup>376</sup> This is so even though the trustee may have exercised his freedom of movement to take up residence elsewhere within the EU.

#### (d) Trust corporations

**597. Notion and special position of trust corporations** English and Northern Irish law recognise a special category of corporate trustee – namely, a “trust corporation”. This trustee enjoys a statutorily privileged status in that they are often entitled to act alone in circumstances where the general law otherwise requires the joint activity of at least two trustees. A trust corporation alone can give a valid receipt for capital money arising from the sale of land.<sup>377</sup> By virtue of greater overreaching powers, a trust corporation is able to effect what from the purchaser’s point of view in avoiding encumbrances burdening the land is a more secure sale.<sup>378</sup> Trustees may retire and leave a trust corporation as sole trustee, whereas a power of retirement would be precluded if this would leave the trust property vested in any other sole trustee.<sup>379</sup> Moreover, as regards the discharge of trustees, a trust corporation as sole trustee stands in a special position: there are circumstances in which an outgoing trustee or trustees may not be effectively discharged by the appointment of a sole trustee in lieu unless the incoming trustee is a trust corporation.<sup>380</sup> One co-trustee may delegate his function by power of attorney to a sole trustee if that other trustee is a trust corporation.<sup>381</sup> Finally, a trustee corporation is liberated from the ordinary duty of a sole trustee who invests in bearer securities to appoint a person to act as custodian of the securities,<sup>382</sup> thus enabling a trust with a trust corporation as sole trustee to make an administrative saving since custodianship of those assets need not be “outsourced”.

**598. Qualification as a trust corporation** Because of the conditions prescribed for qualification as a “trust corporation”, these privileges may be effectively withheld from comparable non-resident corporate bodies. There are three categories of “trust corporation”: the Public Trustee, corporations appointed by the court in a particular case to be a trustee, and corporations entitled by delegated legislation made under the Public Trustee Act 1906 to act as a custodian trustee.<sup>383</sup> It is the latter more general category which is of

<sup>376</sup> See Trustee Act 1925, s. 36 (twelve months); Trustee Act (Northern Ireland) 1958, s. 35. For the similar power in the Republic of Ireland, see the Trustee Act 1893, s. 10. For Scotland, see Trusts (Scotland) Act 1921, s. 23 (six months).

<sup>377</sup> Trustee Act 1925, s. 14(2).

<sup>378</sup> Law of Property Act 1925, ss. 2(2) and 27(2).

<sup>379</sup> Trustee Act 1925, s. 39; Trustee Act (Northern Ireland) 1958, s. 38(1).

<sup>380</sup> Trustee Act 1925, s. 37(1)(c).

<sup>381</sup> Trustee Act 1925, s. 25(2); Trustee Act (Northern Ireland) 1958, s. 26(2).

<sup>382</sup> Trustee Act 2000, ss. 18(1) and 25(2); Trustee Act (Northern Ireland) 2001, ss. 18(1) and 25(2).

<sup>383</sup> Trustee Act 1925, s. 68(18); Law of Property Act 1925, s. 205(1)(xxviii). For Northern Ireland, Administration of Estates (Northern Ireland) Order 1979, as invoked by the Trustee Act (Northern Ireland) 1958, s. 67.

interest. A corporation only qualifies as a trust corporation within this third limb *inter alia* if, besides being constituted under the law of an EU member state and being empowered by its constitution to undertake trust business in England and Wales (requirements which do not in themselves constitute a barrier to non-UK enterprises), the company has one or more places of business in the UK.<sup>384</sup> Thus a company exclusively based in another member state is not in a position to provide trustee services of comparable efficacy to those rendered by similar bodies which are at least partly based in the United Kingdom. In practice they could only offer their services, if at all, as a co-trustee. At the level of corporate bodies, therefore, the market for trusteeship services is for this reason alone effectively confined to bodies within or with a place of business within the United Kingdom.

(e) Restricted powers of investment

**599. Power to acquire land: England and Wales** Unless the trust instrument provides otherwise,<sup>385</sup> a trustee of an English trust of moveables has no power to invest in immovable property outside the United Kingdom other than by investing in a loan secured on immovable property.<sup>386</sup> Equally, unless the trust instrument makes express or implied provision to that effect, the trustees of an English trust will have no power to acquire landed property outside the United Kingdom for occupation by a beneficiary (or some other reason), although they would have a corresponding power (unless excluded)<sup>387</sup> to acquire land or a tenancy for such a purpose within the United Kingdom.<sup>388</sup> The terms of the trust set down by statute in default of more extensive powers thus disable United Kingdom trustees from acquiring land elsewhere in the European Economic Area. Trustees who are desirous of providing a beneficiary with accommodation, consistent with the allocation of benefit under the trust, are compelled to provide that accommodation within the United Kingdom and though, for example, student, worker and pensioner mobility may generate a real desire for accommodation abroad such desires, despite adequate funds, might only be capable of fulfilment by an application to court for the conferment of a wider power to acquire land. A good reason for restricting the investment powers of the trustees is, of course, that rights in the immovable property acquired would ordinarily be subject to the *lex situs* rather than the trust law of a United Kingdom jurisdiction. As explained earlier, it is only in exceptional cases, as already noted, that an English court would be prepared to sanction the exercise of a power to transfer the jurisdiction of a trust.

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<sup>384</sup> Public Trustee (Custodian Trustee) Rules SI 1975 No. 1189.

<sup>385</sup> A trust instrument (or, equally, more specific statutory authority) may confer a wider power of investment than the statutory (default) power since the general statutory authorisations are in addition to any powers conferred by the trust instrument or otherwise: see Trustee Act 2000, ss. 6(1)(a) and 9(a). For the Republic of Ireland, see Trustee Act 1893, s. 4.

<sup>386</sup> Trustee Act 2000, ss. 3(3) and 8(1)(a), authorising only (i) investment in United Kingdom land and (ii) investments in loans secured on land.

<sup>387</sup> Trustee Act 2000, s. 9(b).

<sup>388</sup> *Ibid.*, s. 8(1)(b).

**600. Northern Ireland, Scotland, Republic of Ireland** The position in Northern Ireland is conceivably less restrictive. In view of similar wording but with the notable absence of a qualifying reference to land *in the United Kingdom*, the corresponding statutory power<sup>389</sup> to acquire land as an investment or for occupation by a beneficiary may be regarded as extending to land anywhere. Given in particular the potential advantage for Northern Irish trustees to invest in the economy of the Republic of Ireland, a broad construction may well have been intended. However, the converse argument that the power is confined to land in Northern Ireland, based on considerations about a presumption against enabling a transfer of jurisdiction through investment in immovables abroad, is certainly a tenable one – not least when regard is had to the more explicit formulation of a kindred statutory power conferred by Scottish law. The trustees of a Scottish trust have power to acquire an interest in residential accommodation “whether in Scotland or elsewhere” reasonably required to enable the trustees to provide a suitable residence for occupation by any of the beneficiaries, save where this would be at variance with the terms or purposes of the trust.<sup>390</sup> Scottish trustees do not, however, have a statutory power to invest in heritage.<sup>391</sup> In the Republic of Ireland, where at common law the purchase of land is likewise not an authorised investment<sup>392</sup> and the additional statutory powers of investment<sup>393</sup> equally do not confer any general power to invest in the acquisition of land, the position is clearly more restrictive than in England and Wales. This is not, however, a restriction which produces any cross-border effects since no investment in land is favoured, whether at home or abroad.

**601. Summary** In summary, therefore, only English law has *explicitly* recognised a wide power to invest in land outside the jurisdiction, but the power conferred is one which does not extend to land outside the United Kingdom. English law clearly distinguishes between investment of trust funds in land within the United Kingdom and investment in land elsewhere within the EU since (leaving aside lending secured on land) no dispositive power in favour of the latter is conferred by statute and such power will subsist only if contained in the trust instrument or procured by judicial amendment of the trust terms. Scottish law and the law in the Republic of Ireland stand neutral on this point: they do not confer a dispositive power of investment in land generally and, as regards the former, the power to acquire land for occupation is global in nature. A definitive statement of the position under Northern Irish law must await judicial interpretation. That there is an element of doubt here is unfortunate as such uncertainty may itself induce trustees to edge on the side of caution and not make use of an implied statutory power enabling cross-border investment.

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<sup>389</sup> Trustee Act (Northern Ireland) 2001, s. 8.

<sup>390</sup> Under the Trusts (Scotland) Act 1921, s. 4(1)(ee), trustees of a Scottish trust.

<sup>391</sup> For the list of authorised investments, see the Trustee Investments Act 1961.

<sup>392</sup> *Robinson v Robinson* (1877) LR. 10 Eq 189 (Sullivan MR), where the purchase of a farm was regarded as unauthorised.

<sup>393</sup> For the list of authorised investments, see the Trustee Act 1893, s. 1, as substituted by the Trustee (Authorised Investments Act) 1958, s. 1, in turn replaced by the Trustee (Authorised Investments) Order 1998 SI No. 28, Art. 3, Sched. 1.

## (7.) Conclusion

**602. Interaction of trust law and contract law** Within the common law environment, trust law has developed on the basis of a very specific form of contract law – indeed in part to overcome many of its shortcomings. Unsurprisingly, therefore, trust law interacts extensively with contract law. It performs supplementary functions which in other jurisdictions might be undertaken by contract law itself and which are so integral to a modern workable platform for sophisticated economic transactions that legal solutions are derived only by a consideration of the two legal fields operating together in harmony. As the foregoing text has selectively outlined, this is demonstrable in the fields of loans for specific purposes, specifically enforceable contracts for the transfer of property rights, assignment of contractual rights, enforcement of contracts by third parties, and identifying contractual and property rights derived from contributions to another's purchase of property. In particular, the trust has a specific relevance to the real “worth” of a contractual venture because of the additional security it potentially provides. The ability to assert rights under a trust against the trustee's creditors or successors in title, in given circumstances, gives a trust right in comparison with a merely contractual one “added value”. A complete picture of the legal position derived from a given transaction can therefore only ever be drawn by examining trust and contract components.

**603. Trust law obstacles to competition and full exploitation of the internal market** This chapter has also indicated that the lack of a closely comparable and integrated institution in civil law jurisdictions is a major reason why the trusts are ill-suited to cross-border movement within the EU. This is partly a feature of the weak private international law environment within the Community in this field. Partly in awareness of these difficulties, rules within the common law and Scottish jurisdictions themselves – not least as regards appointment of foreign trustees – have historically been formulated with a view to protecting beneficiaries from transfers of trusts to jurisdictions perceived to provide inadequate recognition to and safeguards for subsisting trust rights. The net result has been to minimise, if not entirely eradicate, any real scope for the export of trust capital and the take up of trustee services elsewhere in the EU.

## Part Three: Issues Common to Parts One and Two

### I. Electronic Communication\*

#### (1.) Introduction

**604. IT law** Hitherto the law related to Information Technology (IT law) has to a large extent been treated as a separate topic covering all the practical problems that modern information technology gives rise to. This shows in legislative texts as well as in literature. The e-commerce Directive is a prime example consisting of many different areas, such as contract law, marketing law, international private law and criminal law. To treat IT law problems specifically has proven difficult. It was, for example, hard to draft the e-commerce Directive due to the fact that it covers so many different areas of law. It was difficult for its drafters to master the whole relevant legal area. There is an electronic communication dimension relevant for almost all areas of law. The new trend is to split up IT law and include its different parts where it belongs in the traditional building blocks of law. The planned changes in the existing Procurement Directive is an example of this new trend. We also see how traditional literature in new editions to a larger extent also covers the aspects of electronic communication relevant for its area of law.<sup>1</sup>

**605. Terminology and approach** At the same time there is a need to synchronise law with respect to electronic communication. It is important to use the same terminology and the same definitions whenever referring to electronic phenomena. Furthermore, the same fundamental approach should be used in legislation and legal analysis with respect to electronic communication. For instance, the policy as to whether express legislative texts are needed in order to include electronic documents in the notion of “writing”, or whether a functional approach suffices, according to which no express legislative text is needed to achieve the same result.<sup>2</sup>

**606. Contract law** Within the area of contract law, particular issues are problematic when making transactions in an electronic environment. The meaning of terms such as “writing”, “document”, “record”, “signature”, “distance”, and “presence” is often uncertain. It is thus difficult to interpret legislative texts and contractual texts containing these terms and to ascertain to what extent they are equivalent to electronic documents, e-mail signatures, tele-conferences and so forth.

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\* Authored by *Christina Ramberg* (Gothenburg); sub-edited by *Christian von Bar*.

<sup>1</sup> *Adlercreutz, Avtalsrätt I<sup>3</sup>* (2002); *Nilesen, Udbud af offentlige kontrakter<sup>2</sup>* (2002).

<sup>2</sup> *Hellner, Lagstiftning inom förmögenhetsrätten, teori, praktik och teknik* (1990); *Grönfors, Towards Sea Waybills and Electronic Documents* (1991).

**607. Property law** Within the area of property law other problems occur with respect to electronic communication. The most important being to what extent an electronic document can be a bearer of rights. The crucial issue if using a functional approach is normally to determine whether the electronic document can be transferred in a way whereby a copy is not left in the hands of the transferor. Such a technique is available (although still cumbersome to use). Another aspect is to what extent notices of transfer of property or transfer of security can be given by electronic means of communication.

**608. Tort law** Within the area of tort law, a number of actions have become more troublesome due to the modern means of electronic communication. Just to mention a few: Pure economic loss due to defamation on the internet and the conflicting interest of securing freedom of speech; Pure economic loss due to the spreading of viruses in electronic environments and the problem of establishing which is the applicable law for such actions; Pure economic loss due to incorrect information about the identity of a holder of a PKI-electronic signature and the difficult issue of if, and to what extent such liability should be allowed to be excluded.

**609. Legislative technique** We see that these three areas of law all entail difficult questions with respect to electronic communication. The problems described are of a wholly different nature. The experts in each field should solve the problems within each field of law. It is only with knowledge of the particular field of law that the questions can be adequately solved both with respect to substance and structure. At the same time it is necessary to use a common legislative technique. The legislative technique should be the same no matter within which area of law we find the rule. That is to say, the law should either be based on a general assumption that electronic phenomena have legal effects unless otherwise provided by specific legislation, or based on the opposite general assumption that electronic phenomena have no legal effect unless specifically provided by legislation. The same approach should be taken for all areas of law: Should we embrace the new technique or should we take a more hesitant standpoint?

**610. Need for harmonisation** The increased use of electronic communication and its international (or a-national) character forces us to harmonise law. International private law is an awkward method to use in practice. In the course of harmonisation it is important to not only harmonise law related to electronic commerce but to encompass the old traditional structure of law and include the different rules for electronic communication in its proper context. Consequently, we cannot harmonise only rules on electronic commerce, but must harmonise the whole structure of law.

## (2) Specifically on the Consequence of Harmonising Contract Law Only

**611. UNCITRAL** Much work has already been done with respect to harmonisation of electronic commerce and contract law. Most important in this respect is the UNCITRAL Model Law on Electronic Commerce.<sup>3</sup> The discussions within UNCITRAL during the

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<sup>3</sup> [www.uncitral.org](http://www.uncitral.org).

elaboration of the Model Law contributed to a deeper understanding of the problems in relation to contract law and electronic communication.<sup>4</sup> The follow up UNCITRAL Model Law on Electronic Signatures played a similar – although more limited – role.<sup>5</sup> The UNCITRAL Model Laws have served as a source of inspiration for many countries when introducing legislation on electronic commerce. The influence is particularly salient in the Canadian Uniform Electronic Commerce Act and the US Uniform Electronic Transaction Act.<sup>6</sup>

**612. EU legislation** Within the EU some initiatives of harmonisation regarding electronic commerce and contract law have been made, notably the Directives on Electronic Signatures, the e-commerce Directive, the Invoicing Directive, and the Distance Selling Directive.<sup>7</sup> As is the case with all directives, the implementation does not necessarily lead to harmonisation. In some instances the implementation of the mentioned directives has actually lead to increased differences between the national laws in Europe.<sup>8</sup> This sad effect is one of the reasons why it is necessary to use another strategy for the harmonisation of European contract law.<sup>9</sup> In this context focus will not be on describing the experiences of harmonisation by directives. Instead the likely result of harmonisation of contract law with respect to electronic commerce will be outlined together with an analysis of whether such harmonisation entails consequences outside the area of contract law.

**613. PECL and SGECC** As compared to EC Directives, PECL was mainly elaborated without taking into consideration the special problems relating to electronic communication. The wording of PECL is, however, mainly media neutral. That is to say, the articles can be applied equally when transactions are made by physical personal oral communication, by traditional ink-on-paper-letters, by e-mail or over internet websites. There are some terms which may cause problems, for instance “reach”, “sent”, “notice”,

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<sup>4</sup> Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, *Tulane Law Review*, Vol 72, no 6, p 1931; *Comments to Uniform Electronic Transactions Act*, see [www.uetaonline.com](http://www.uetaonline.com).

<sup>5</sup> [www.uncitral.org](http://www.uncitral.org).

<sup>6</sup> [www.uetaonline.com](http://www.uetaonline.com).

<sup>7</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (‘Directive on electronic commerce’); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Council Directive 2001/115/EC of 20 December 2001 amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax.

<sup>8</sup> *Christina Hultmark Ramberg*, *The E-Commerce Directive and formation of contract in a comparative perspective*, *European Law Review*, October 2002, p 429.

<sup>9</sup> Report on the approximation of the civil and commercial law of the member states (COM(2001)398 – C5-0471/2001 – 2001/2187(COS)) Section 1 p 3.

“oral” and “writing”. Some of these terms are already defined in PECL. An example is PECL Art. 1:301(6) defining “writing” as electronic mail and other means of communication capable of providing a readable record of the statement on both sides. Other terms used in PECL can be defined quite easily without express definitions by the use of the functional equivalent method elaborated in the UNCITRAL Model Law on Electronic Commerce (mainly art. 5).<sup>10</sup> The more specific parts of contract law, not dealt with in PECL, for instance with respect to personal security (guarantees for credits), sales, long term contracts and services are presently dealt with by the Study Group on a European Civil Code (SGECC). This group is continually examining to what extent particular regulation with respect to electronic communication is needed. For instance, the group has intensively debated to what extent a consumer should be able to satisfy the form requirement of a signature in guarantees for credits by using electronic means of communication.

614. It should be noted that the PECL, the SGECC, UNIDROIT and the CISG Advisory Council all take the same approach. They all refrain from particularly regulating electronic commerce. Instead they generally apply the same rule no matter what type of communication the parties have used. Only rarely and for very particular situations are special rules stipulated for non-electronic or electronic communication.

615. **A different approach in existing EC Directives** The directives relating to electronic commerce and contract law often take a different approach. They are mainly specifically aimed at electronic communication. Many member states have implemented these directives in legislation particularly aimed at electronic transactions. This entails a fundamentally problematic question of what qualifies as electronic transactions. The new legislation is only applicable to electronic transactions and it is not infrequent that transactions are mixed and that thus the borderline between electronic and non-electronic transactions becomes blurred. Specific electronic transaction legislation creates a fragmented structure in national law; one rule for electronic transactions and another rule for non-electronic transactions.<sup>11</sup> Examples of this problem are (i) the legal consequence of input errors in electronic and non-electronic communication and (ii) to what extent the mandatory seven days cancellation period in the Distance Selling Directive is applicable to transactions where consumers make orders in a physical store on a computer.<sup>12</sup> It should be noted that PECL, CISG and UNIDROIT Principles all avoid this

<sup>10</sup> UNCITRAL Model Law on Electronic Commerce, Guide to enactment ([www.uncitral.org](http://www.uncitral.org)) paras 15-18 and 46. See also *Christina Hultmark*, European and U.S. Perspectives on Electronic Documents and Electronic Signatures, *Tulane European and Civil Law Forum*, Vol 14, 1999, p 123.

<sup>11</sup> See the ongoing discussion in the UNCITRAL Working group on electronic commerce, where the International Chamber of Commerce strongly opposes a convention on electronic commerce arguing that international business is worried about creating a separate e-commerce regime. See Report Working Group IV (Electronic Commerce) on the work of its fortieth session, 14-18 October 2002, pp 76, 79, 80-81.

<sup>12</sup> *Christina Hultmark*, Ny distansavtalslag, *Juridisk Tidskrift*, 2000-01 p 48.

problem of qualifications since they treat all situations the same, irrespective of what medium the parties have used.<sup>13</sup>

### (3.) Contract Law and its Relation to Property Law

**616. Substance and structure** The rules applicable to contract law are indirectly relevant for some issues in property law. First, it is a matter of substance: Are the concepts of “notice”, “writing”, “original”, “record” and “document” similar in contract law and property law? Second, it is a matter of structure: If contract law uses a structure that is media neutral, and where the rules are generally applicable to all types of communication unless otherwise specifically provided, it would be preferable if the same structure were used in property law.

**617. Transferable records** An important feature of property law or security law is that the transfer of rights is legally secure against the transferor’s creditors, first when a document classified as the “bearer” of the right is physically transferred to the receiver. The most frequent example is money. The idea is that a particular document carries the features of ownership. Since the rights are not tangible and cannot be transferred in a physical sense, a document becomes the tangible bearer of the right and the transfer to the receiver of the document is considered equivalent to the transfer of a physical object. The paper document carrying the legal right is a single one. When the paper document is handed over to the receiver, the paper document is no longer in the possession of the transferor. The problem with electronic documents is that normally an electronic document is not sent away to the receiver but rather copied. One copy is left with the transferor and another copy is sent to the receiver. There is, however, a technique whereby an electronic document can be sent to the receiver without a copy being left with the transferor. This is a technique used for e-money, for example.

**618. Synchronisation of terminology** When harmonising property law, it is important to also make possible the use of electronic documents as bearers of rights. It is then important to carefully synchronise these provisions in property law to the provisions in contract law. The definitions of “document”, “record” and “transferable”, should preferably be the same. Such synchronisation has been made in the US Uniform Electronic Transactions Act.<sup>14</sup> If the functional equivalent method is used in contract law, we do not think that any major problems will arise if property law was to be harmonised in a second step after contract law.

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<sup>13</sup> See for instance the study carried out by Unidroit; Study L – Doc. 77, Working Group for the preparation of Principles of International Commercial Contracts (Questionnaire prepared by Professors M.J. Bonell and E.A. Farnsworth and replies of Professors A.H. Boss, J. Ginsburg and C. Ramberg). See also the Opinion on Electronic Commerce to be published by the CISG Advisory Board in late 2003.

<sup>14</sup> See [www.uctaonline.com](http://www.uctaonline.com) Sec. 2(5), (7), (13) and Sec. 16. See also the UNCITRAL Convention on the Assignment of Receivables in International Trade, Art 5.

**619. Notices** In property law, notices of different types are often important. To whom notice should be given differs; sometimes it is to other parties, sometimes to authorities or repositories. When harmonising property law it is necessary to consider to what extent notices could be given electronically. The definitions of notice, sent, received, writing and signature are then relevant. Since these terms are also frequent in contract law, it would be preferable if the terms were defined in the same way. The problems have been analysed in many reports.<sup>15</sup> There is clearly legal uncertainty within this area of law. The prevailing view seems to be that the use of a functional equivalent method is recommendable. If this method is used in both contract law and property law, no major problems will arise if property law was to be harmonised in a second step after contract law.

**620. Conclusion** If contract law is harmonised isolated from other areas, consequences will follow for property law. First, the elaboration of rules on property law will have a natural starting point in the definitions already used in contract law. This will be particularly relevant for the terms referred to above. This is not likely to lead to any substantial problems. If there is a need to make a separate regulation for property law in some respect, it can be done. The end result would not be better or worse due to the fact that the two areas of law were not harmonised simultaneously. Second, there will be consequences of structural nature. If contract law is harmonised using a media neutral structure, the same structure must necessarily be used for property law. If contract law focuses on the functions of a rule instead of using a “Begiffsjurizprudential” approach the same functional approach must be used for property law. Otherwise the traditional way of interpreting private law legislative texts will be severely damaged. If contract law is harmonised isolated from property law, the ensuing harmonisation of property law must follow the structure of contract law. This, however, will likely not cause much of a problem. In the work of harmonisation it is often necessary to use a functional and media neutral approach, anyway.

#### (4.) Contract Law and its Relation to Tort Law

**621. Structure** The need for synchronising contract law and tort law with respect to electronic communication is less than for synchronising contract law and property law. There is still a structural problem: Should the rules in tort law be generally media neutral or should there be specific rules for actions of an electronic nature? As said above, contract law will likely take a media neutral approach. We would dare predict that this would be a good solution also for tort law. For instance, take the case of pure economic loss due to defamation. We would be inclined to believe that the same rule and the same responsibility should apply irrespective of whether the defamatory act was made on a

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<sup>15</sup> See Legal aspects of a Bolero Bill of Lading at [www.bolero.net](http://www.bolero.net); The determination of an “original” document in the context of UCP 500 sub-Art.20(b), ICC 12 July 1999 at [www.iccwbo.org](http://www.iccwbo.org); *Diana Faber*, Electronic Bills of Lading, *Lloyd’s Maritime and Commercial Law Quarterly*, Part 2, May 1996; The work in the UNCITRAL Working Group on Security Interest at [www.uncitral.org](http://www.uncitral.org).

website, by e-mail or by ink-on-paper-letters. We have, of course the problem of creating a free sphere to ensure the interest of freedom of speech, but it is highly likely that the present regulation – mainly applicable to radio and journals – will be changed to take into account also electronic transmissions. Anyhow, the structural approach not to generally leave out the electronic forms of communication will likely prevail.<sup>16</sup> If contract law is harmonised isolated from tort law, it creates a presumption to handle tort law in the same media neutral way. However, it is not necessary and we are not convinced that it is as appropriate for tort law to take the media neutral approach as it is for contract law.

**622. Substance** When it comes to substance, there are not as many “colliding” issues in contract law and tort law with respect to electronic communications. The main area where contract law and tort law overlap is calculation of damages. This is not an area where electronic communication entails specific problems.

**623. Provider’s liability** There is, however, one particular problem worthy of mentioning. The Electronic Signature Directive art. 6 stipulates a mandatory minimum liability for providers (CSP) of qualified electronic signature certificates. The CSP is not allowed to limit its liability below a minimum standard.<sup>17</sup> A limitation/exclusion of liability could be made either contractually when the CSP and the party relying on a qualified certificate have a contractual relationship. When their relationship is not contractual, but the relying party relies on a qualified certificate despite not having a contractual relationship with the CSP, the CSP may have limited or excluded liability according to the certificate. In neither of these cases is the CSP allowed to limit its liability below a certain degree. It has turned out in practice that it is only very rarely that a relying party does not have a contractual relationship with the CSP. From a legislative point of view there may be reason to synchronise the non-contractual and contractual situation, in the way that has been done in the e-signature Directive. It should however, be noted that the exclusion of liability in contractual relationships is closely linked to the price setting model as opposed to what is the case in non-contractual relationships where the relying party does not pay anything to the CSP. Furthermore, it should be noted that the means of drawing attention to the exclusion of liability are different in contractual and non-contractual relationships. When the relying party is fully aware that he may not rely on a certificate in the sense that he will not be economically compensated if the certificate is inaccurate, the possibility to exclude liability should be greater. We are of the opinion that the solution chosen in the e-signature Directive is too simple. It does not appropriately take into account the differences between contractual and non-contractual relationships. If contract law were to be harmonised isolated from tort law, the problem of e-signatures would have to be solved for contractual situations first. If tort law is harmonised later on, a solution must be found for non-contractual relationships. This

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<sup>16</sup> See for instance the English Law Reform Commission, Defamation on the internet: A Preliminary Investigation, Scoping study no 2 December 2002.

<sup>17</sup> See (from a German perspective) Beckmann, Verantwortlichkeit von Online-Dienstanbietern in Europa und den Vereinigten Staaten von Amerika (2001).

does not cause a huge problem. The tort law solution should consider the contract law solution, but they may be solved quite independently.

## (5.) Conclusion

**624. Harmonisation of contract law not sufficient** To conclude, isolated harmonisation of contract law without taking into account property law or tort law may cause some problems with respect to electronic communication. To start out by harmonising only contract law would, however, not be devastating. The approach and structure chosen in contract law to deal with electronic communication will likely be the same for property law. With respect to tort law, a common structure is not necessary with respect to the problems raised by electronic communication. The internal market with respect to electronic commerce will likely be able to function smoothly even though contract law is harmonised before the areas of property law and tort law are. Tort law and property law are areas of law that call for harmonisation. The use of electronic communication increases the problems with respect to international private law and is a true obstacle to the realisation of the internal market. The fact that contract law is harmonised should not slow down the efforts to harmonise property law and tort law as well.

## II. L'Opposabilité des Contrats aux Tiers et par les Tiers\*

### (1.) Introduction

**625. Le concept d'opposabilité** En vertu du principe de l'effet relatif des conventions, seules les parties contractantes acquièrent la qualité de créancier ou de débiteur par la force du contrat. De même, le contrat ne peut transmettre de droit que d'une partie à l'autre. Toutefois, l'acquisition de la qualité de débiteur ou de créancier, ainsi que le transfert de droits prévu par le contrat se produisent à l'égard de tous. C'est ce qu'exprime la notion d'opposabilité. Celle-ci «permet aux parties à l'égard des tiers, comme aux tiers à l'égard des parties, de se prévaloir de la situation juridique créée par le contrat». <sup>18</sup> Plus généralement, on considère que tous les effets du contrat à l'égard des tiers se rattachent à l'opposabilité du contrat, à l'exception de ceux qui, telle la stipulation pour autrui, sont des exceptions au principe de l'effet relatif.

**626. L'article 1165 du Code civil et l'origine doctrinale du principe d'opposabilité** Le principe de l'opposabilité des contrats aux tiers et par les tiers est propre aux droits

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<sup>18</sup> *Ghestin/Jamin/Billiau*, Les effets du contrat, *Traité de droit civil*<sup>3</sup>, sous la dir. de J. Ghestin, (2001), n° 678.

français et belge.<sup>19</sup> Cette particularité peut s'expliquer par la présence, dans les deux droits, d'une disposition légale qui semble interdire, de façon particulièrement radicale, tout effet du contrat à l'égard des tiers. L'article 1165 des Codes civils français et belge dispose en effet que «les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point aux tiers, et elles ne lui profitent que dans le cas (de la stipulation pour autrui)». Or, pris au pied de la lettre, ce texte est incompatible avec de nombreuses solutions bien établies. Le Code civil lui-même, en posant le principe du transfert de propriété *solo consensu* (art. 711 et 1138) semble contredire le principe de l'effet relatif ainsi défini. Il va de soi que les contrats translatifs de propriété peuvent nuire ou bénéficier à de nombreux tiers. Le contrat n'est indifférent ni aux créanciers des parties, ni aux tiers souhaitant acquérir la chose qui a pu être transmise par le contrat, ni aux tiers qui l'acquerront ultérieurement. Ces tiers, ainsi que d'autres, peuvent subir les inconvénients du contrat ou bénéficier de ses avantages. Avant la découverte du principe d'opposabilité, la doctrine avait réagi de diverses façons à cette contradiction. Certains auteurs avaient tenté de la résoudre en affirmant que l'article 1165 ne s'appliquerait pas aux contrats translatifs de propriété;<sup>20</sup> d'autres soutenaient que les personnes les plus concernées par le contrat, tels les créanciers et ayants-cause des parties, ne seraient pas des tiers au sens du même texte.<sup>21</sup> Toutes ces tentatives d'explication étaient néanmoins insuffisantes. Les effets du contrat à l'égard des tiers ne se limitent pas aux effets translatifs de droits. Un contrat peut conférer des pouvoirs, créer une personne morale, définir un régime matrimonial et son existence peut avoir des incidences importantes en matière de responsabilité délictuelle. De plus, les tiers qui sont susceptibles de subir les effets du contrat sont nombreux. On a alors tenté de résoudre le problème en dénonçant l'erreur des auteurs du Code civil, erreur provoquée par l'individualisme excessif qui les aurait animés. En réalité, «le prétendu principe de l'effet relatif des contrats» n'existerait pas.<sup>22</sup> Mais cette thèse n'est pas non plus convaincante, car tout le monde s'accorde sur le fait que le pouvoir des parties n'est pas sans limites. La théorie de l'opposabilité a permis de surmonter ces difficultés. Grâce à une nouvelle lecture, plus restrictive, de l'article 1165 du Code civil, on a pu dégager le principe d'opposabilité. Désormais on considère que le principe de l'effet relatif concerne seulement l'effet créateur de droits et d'obligations; par ailleurs, le contrat est opposable aux tiers.

**627. L'accueil de la théorie par le droit positif** Formulée pour mieux rendre compte du droit positif, la théorie de l'opposabilité a été adoptée par une doctrine quasi-unanime. Presque tous les ouvrages consacrés au droit des contrats enseignent que le principe de l'effet relatif du contrat doit être complété par un principe d'opposabilité du contrat aux tiers et par les tiers.<sup>23</sup> La jurisprudence s'est pendant longtemps inspirée de la théorie de

<sup>19</sup> Sur le droit belge, v. not. *Fontaine*, Les effets «internes» et les effets «externes» des contrats, in Les effets du contrat à l'égard des tiers. Comparaisons franco-belges (1992).

<sup>20</sup> Par ex. *Demolombe*, Cours de Code napoleon, t. XXV, Paris 1869, n°45.

<sup>21</sup> Cf. not. *Josserand*, Cours de droit civil positif français, t.II<sup>2</sup> (1932) n°259.

<sup>22</sup> *Savatier*, Le prétendu principe de l'effet relatif des contrats, Rev. trim. dr. civ. 1933, p.525.

<sup>23</sup> Par ex. *Ghestin/Jamin/Billiau*, Les effets ..., *op. cit.*, n°724 et s.; cf. *Terré/Simler/Lequette*, Droit civil, Les obligations<sup>8</sup> (2002) n°490; *H., L. et J. Mazeaud, F. Chabas*, Leçons de droit civil, t. 2, 1er vol., Obligations, théorie générale<sup>9</sup> (par *Chabas*, 1998), n°758.

l'opposabilité sans s'y référer ouvertement. Récemment, la Cour de Cassation a néanmoins consacré le principe de façon explicite. Elle a en effet approuvé une Cour d'appel d'avoir fait «application du principe d'opposabilité des conventions aux tiers»<sup>24</sup> pour retenir la responsabilité d'un tiers qui avait porté atteinte à un droit résultant d'un contrat. Par ailleurs, elle a justifié l'assimilation des fautes contractuelle et délictuelle opérée par quelques arrêts récents en expliquant, dans son Rapport annuel, que «l'opposabilité est le fondement de cette solution».<sup>25</sup>

**628. Le fondement discuté de l'opposabilité** Selon la doctrine et la jurisprudence française, l'opposabilité constitue donc un principe relevant du droit des contrats permettant d'expliquer divers effets du contrat à l'égard des tiers, notamment en matière de responsabilité ou de propriété. Le fondement de ce principe est controversé. Pendant longtemps, on s'est contenté de souligner que le contrat serait opposable en tant que fait ou «fait social». Et il est vrai que le contrat est un fait en ce sens qu'il peut être pris en compte par des règles de droit diverses qui lui font produire des effets de droit. Toutefois, cette affirmation, pour exacte qu'elle soit, ne donne, à elle seule, aucune réponse à la question de savoir quels sont les effets que le contrat doit produire à l'égard des tiers, question que le principe de l'opposabilité prétend pourtant résoudre. Des analyses plus approfondies s'appuient sur la notion de droit subjectif, dont la nature impliquerait une reconnaissance par tous et une protection *erga omnes*,<sup>26</sup> ou sur la force obligatoire du contrat dont le principe d'opposabilité constituerait le prolongement nécessaire.<sup>27</sup> On peut se demander, cependant, si ce principe unitaire, qui est certes commode pour expliquer les effets du contrat à l'égard des tiers en présence d'un texte qui semble en nier l'existence, ne dissimule pas, en réalité, la diversité des règles de droits qui justifient en droit français les effets variés du contrat à l'égard des tiers.<sup>28</sup> La comparaison des solutions françaises avec celles retenues dans d'autres systèmes juridiques fait en tout cas apparaître des divergences qui s'expliquent difficilement si l'on ramène la question des effets du contrat à l'égard des tiers à un principe unique, reposant sur des fondements aussi généraux que la nature des droits subjectifs ou le principe de la force obligatoire des contrats. Et même au regard des seuls droits français et belge, il n'est pas certain que l'on puisse dégager un régime uniforme des effets du contrat à l'égard des tiers. Les conditions de l'opposabilité du contrat aux tiers peuvent en effet varier en fonction des contrats et des effets envisagés.<sup>29</sup> L'homogénéité des effets du contrat à l'égard des tiers et l'aptitude d'un principe unique à en rendre compte peuvent donc paraître discutables. Mais tant par

<sup>24</sup> Cass.civ. I, 17 oct. 2000, Bull. n° 246, D. 2001.952 n. Billiau et Moury; JCP 2001.I. 338 obs. Viney.

<sup>25</sup> Rapport de la Cour de cassation 2000, Documentation française, p. 387.

<sup>26</sup> Par ex., Ghestin, Introduction (Rapport français), in M. Fontaine et J. Ghestin, Les effets du contrat à l'égard des tiers. Comparaisons franco-belges (1992); Flour/Aubert/Savaux, Les obligations, I. L'acte juridique (2002) n°435.

<sup>27</sup> Ghestin/Jamin/Billiau, Les effets *op. cit.*, n°724 et s.; analyse reprise par Terré/Simler/Lequette, Droit civil, Les obligations<sup>8</sup> (2002) n°490.

<sup>28</sup> Cf., en ce sens, v. Wintgen, Etude critique de la notion d'opposabilité, th. Paris I, 2002.

<sup>29</sup> Cf. not., à propos du rôle de la connaissance du contrat par les tiers, Ghestin/Jamin/Billiau, Les effets, *op.cit.*, n°752 et s.

sa consécration doctrinale et, surtout, jurisprudentielle comme principe juridique qu'à travers les solutions qu'on y rattache, l'opposabilité du contrat n'en fait pas moins partie intégrante du droit positif français. L'absence d'un principe semblable dans les autres droits européens, où certains aspects de l'opposabilité relèvent exclusivement du droit des biens ou du droit de la responsabilité délictuelle, montre d'ailleurs parfaitement la difficulté de délimiter le domaine du droit des contrats dans une perspective d'harmonisation européenne.

**629. Plan** L'opposabilité du contrat aux tiers et par les tiers englobe tous les effets non obligatoires du contrat à l'égard des tiers, c'est-à-dire tous les effets autres que ceux qui, par exception au principe de l'effet relatif, rendent un tiers créancier ou débiteur (stipulation pour autrui, actions directes). Ces effets sont variés. Un contrat peut par exemple être invoqué pour établir l'existence ou l'absence d'un intérêt à agir, condition procédurale de l'action en justice.<sup>30</sup> On peut également rattacher à la notion d'opposabilité l'effet créateur de personnalité morale reconnu à certains contrats. Nous n'examinerons pas tous les aspects de l'opposabilité du contrat, mais, conformément à l'objet de cette étude, uniquement ceux qui se situent à la frontière entre le droit des contrats et le droit des biens d'une part et du droit de la responsabilité délictuelle d'autre part. Ces questions ont d'ailleurs toujours été considérées comme les principales applications de la notion. Nous envisagerons dans une première partie les aspects de l'opposabilité qui touchent au droit des biens, et dans une deuxième et troisième partie ceux qui touchent au droit de la responsabilité délictuelle, à savoir la responsabilité des tiers envers les parties et la responsabilité des parties envers les tiers.

## (2.) L'Opposabilité des Effets Translatifs ou Constitutifs de Droits Réels

**630. La portée du principe en droit français** En droit français, les droits réels peuvent être transmis ou constitués<sup>31</sup> par l'effet d'un contrat et ce transfert est en principe opposable à tous. Nous examinerons la portée de ce principe en droit français, avant d'analyser sa portée dans les opérations transfrontalières. Le principe de l'opposabilité des effets translatifs et constitutifs de droits réels est le corollaire du principe du transfert *solo consensu* de la propriété. Il se trouve néanmoins tempéré par de nombreuses règles de publicité.

**631. La règle du transfert *solo consensu* des droits et l'opposabilité de ce transfert** La règle française du transfert de propriété *solo consensu*, par le seul effet du consentement, résulte du rapprochement de deux principes fondamentaux consacrés par le Code civil. En vertu du principe du consensualisme, les contrats se forment en règle générale par le seul échange des consentements. Des articles 711 et 1138 du Code civil, il se déduit que la

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<sup>30</sup> Cf. not. *Ghestin/Jamin/Billiau*, Les effets ..., op. cit., n° 725.

<sup>31</sup> On parle de constitution plutôt que de transfert lorsqu'un propriétaire consent à autrui un droit réel accessoire à une créance ou un démembrement de propriété. Mais on ne peut accorder à autrui plus de droits que l'on a soi-même et la constitution est donc également une forme de transfert de droits.

propriété s'acquiert par le seul effet des obligations de transférer la propriété. Par conséquent, la propriété s'acquiert en principe par le seul effet du consentement au contrat qui prévoit ce transfert. Il en va, en principe, de même pour les droits réels démembrés et les autres droits cessibles: lorsque la formation du contrat n'est soumise par la loi à aucune condition de forme,<sup>32</sup> son effet translatif ou constitutif se produit de plein droit, par le seul effet du consentement. La règle est néanmoins supplétive de volonté et la loi y déroge lorsqu'il s'agit d'un transfert de droits sur des choses de genre non individualisées. Ces dernières ne sont transférées qu'après l'individualisation de la chose.

**632. Opposabilité du transfert** En règle générale, l'effet translatif ou constitutif de droit se produit à l'égard de tous. Il est opposable *erga omnes*. Cette opposabilité aux tiers et par les tiers du transfert des droits n'est évidemment pas une particularité du droit français. Lorsque des droits impliquent des prérogatives à l'égard de tous, comme c'est le cas des droits réels, le transfert de tels droits à une personne déterminée n'est effectif que s'il peut être opposé à tous. L'originalité du droit français réside dans le fait que le transfert de propriété (et des autres droits réels) constitue en principe un effet direct du contrat ou des obligations qu'il fait naître et que ce transfert ne soit soumis à aucune condition de forme supplémentaire. Il en va ainsi même en matière immobilière.

**633. Protection des tiers** A la différence du droit allemand, le droit français ne distingue donc pas entre l'acte créateur d'obligations et l'acte de disposition soumis à des conditions de validité qui lui sont propres. Il ignore également la distinction anglaise entre *equitable interest* et *legal interest* qui, en matière immobilière, permet de subordonner le transfert de la pleine propriété à l'accomplissement de certaines formalités. Ces règles de forme qui gouvernent, dans d'autres systèmes juridiques, le transfert de propriété permettent notamment d'assurer l'information et donc la protection des tiers. Le droit français<sup>33</sup> n'est pas insensible à cette préoccupation. Mais au lieu de subordonner le transfert de propriété à des formalités, notamment de publicité, il distingue dans de nombreuses hypothèses entre l'effet translatif du contrat, qui se produit *solo consensu*, et l'opposabilité aux tiers de cet effet, subordonnée à l'accomplissement d'une formalité.

**634. L'incidence des règles de publicité** Les règles de publicité peuvent être considérées comme des exceptions au principe d'opposabilité dans la mesure où elles subordonnent à l'accomplissement d'une formalité l'opposabilité d'un effet translatif qui se produit valablement entre les parties. Certaines règles concernent des biens soumis à un système de publicité en raison de leur nature, d'autres, celles qui sont relatives aux sûretés mobilières, s'appliquent à certains contrats seulement.

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<sup>32</sup> Il existe un certain nombre d'exceptions au consensualisme. Les hypothèques et les donations requièrent par exemple la forme authentique.

<sup>33</sup> Nous laisserons de côté le droit local applicable en Alsace-Lorraine, largement inspiré du droit allemand.

**635. Droits réels immobiliers** En vertu de l'article 28 du décret du 4 janvier 1955<sup>34</sup> les actes portant mutation ou constitution de droits réels immobiliers<sup>35</sup> sont publiés à la conservation des hypothèques. Seuls des actes dressés par des officiers publics pouvant être publiés, le recours à un notaire est en pratique nécessaire. A défaut de publication, ces actes sont «inopposables aux tiers qui, sur le même immeuble, ont acquis, du même auteur, des droits concurrents en vertu d'actes ou de décisions soumis à la même obligation de publicité et publiés» (art. 30 du décret précité). L'acquéreur d'un immeuble devient donc propriétaire par la seule conclusion du contrat. Toutefois, son droit ne devient opposable aux tiers que par la publication du contrat. Pendant la période qui se situe entre l'acquisition et la publication, un tiers pourra efficacement acquérir des droits sur le même immeuble et emporter le conflit qui l'oppose au premier acquéreur en publiant son acte en premier.<sup>36</sup> Par ailleurs, les créanciers chirographaires pourront saisir l'immeuble entre les mains de leur débiteur tant qu'une aliénation consentie par ce dernier n'a pas été publiée.<sup>37</sup> L'inopposabilité du transfert de droits résultant du défaut de publicité pourra, le cas échéant, être corrigée par la mise en jeu de la responsabilité délictuelle du tiers de mauvaise foi. En effet, le tiers qui, de mauvaise foi, porte atteinte à l'exécution d'un contrat, engage sa responsabilité délictuelle. Et même si l'effet translatif de l'aliénation non publiée ne se produit pas à l'égard des tiers, qui peuvent donc acquérir des droits concurrents sur le même immeuble, l'existence du contrat doit être respectée par ceux qui en ont connaissance. L'éventuelle responsabilité délictuelle du tiers acquéreur pourra donner lieu à une réparation en nature: le préjudice causé au premier acquéreur par la faute du second acquéreur de mauvaise foi sera sanctionné par l'interdiction pour ce dernier de se prévaloir du défaut de publicité.<sup>38</sup>

**636. Meubles incorporels et meubles corporels immatriculés** Il existe un certain nombre de systèmes de publicité à fin d'opposabilité s'appliquant à des catégories déterminées de meubles. Nous nous bornerons à en signaler l'existence, sans entrer dans le détail de leur régime.<sup>39</sup> Il s'agit notamment des navires, aéronefs, droits d'exploitation d'œuvres cinématographiques, brevets, marques et des valeurs mobilières inscrites dans un compte. Ces systèmes de publicité obéissent à la même logique que la publicité foncière. L'accom-

<sup>34</sup> Le décret ne s'applique pas aux hypothèques dont la publication est régie par les articles 2114 s. du Code civil. Ces deux dispositifs s'inspirent néanmoins des mêmes principes généraux.

<sup>35</sup> Il convient de signaler qu'en droit français, seuls les droits réels immobiliers peuvent être efficacement publiés. Par conséquent, les promesses de vente et pactes de préférence portant sur des immeubles ne confèrent à leur bénéficiaire qu'un droit personnel qui n'est pas susceptible de faire l'objet d'une publication semblable à celle résultant de la «prénotation» (*Vormerkung*) du droit allemand.

<sup>36</sup> *Ghestin/Jamin/Billiau*, Les effets ..., op. cit., n° 792 et s.; *Billiau*, L'opposabilité des contrats relatifs aux droits réels, in: Les effets du contrat à l'égard des tiers, Comparaisons franco-belges (1992) p. 190 s., n° 39.

<sup>37</sup> Cf. *Piedelièvre*, La publicité foncière, Traité de droit civil, sous la dir. de J. Ghestin (2000) n°426. La solution se déduit de l'article 696 al. 2 du Code de procédure civile (ancien).

<sup>38</sup> Cass.civ. III, 22 mars 1968, Bull. n° 129.

<sup>39</sup> Pour de plus amples développements, v. *Ghestin/Jamin/Billiau*, Les effets, op.cit., n° 789 et s.

plissement des formalités qu'ils prévoient constitue une condition de l'opposabilité des contrats translatifs aux tiers.

**637. Meubles corporels** En ce qui concerne les meubles corporels, aucun système de publicité de portée générale ne fait échec au principe de l'opposabilité des effets translatifs. Les transferts de droits réels mobiliers sont donc en principe opposables aux tiers et par les tiers dès qu'ils se produisent en vertu d'un contrat translatif. Il faut néanmoins signaler que la présomption de propriété qui s'attache, en droit français, à la possession du meuble peut jouer un rôle semblable à celui d'une publicité. L'article 2279 du Code civil règle le conflit entre le propriétaire du meuble et le tiers acquéreur tenant la chose d'une personne qui n'avait pas le pouvoir d'en disposer. Le tiers acquéreur l'emporte s'il est de bonne foi et s'il est entré en possession. En matière mobilière, un droit réel qui n'est pas consolidé par la possession sera donc facilement anéanti dans un souci de protection des tiers. L'opposabilité des contrats présente ainsi un risque limité pour les intérêts des tiers acquéreurs qui peuvent s'en tenir à l'apparence résultant de la possession.

**638. Gage** En matière civile, le gage de droit commun n'est opposable aux tiers que s'il est constaté par un acte notarié ou un acte sous seing privé enregistré (art. 2074 C. civ.). En matière commerciale, aucun écrit n'est exigé (art. 521-1 C. com.).<sup>40</sup> Qu'il soit civil ou commercial, l'opposabilité du gage aux tiers est subordonnée à la dépossession du débiteur au profit du créancier gagiste (art. 2076 du C. civ.). La loi organise en outre un certain nombre de gages spéciaux, soumis à des conditions d'opposabilité particulières.<sup>41</sup> Nous citerons, à titre d'exemple pouvant intéresser les opérations transfrontalières, le gage des véhicules automobiles achetés à crédit (Décret n° 53-968 du 30 sept. 1953). Ce gage, qui peut être constitué au profit de tout vendeur à crédit d'un véhicule ou du prêteur de deniers qui finance l'achat, ne requiert pas la dépossession matérielle de l'acheteur. Son opposabilité aux tiers est subordonnée à l'inscription sur un registre tenu dans la préfecture qui a délivré les documents administratifs («carte grise»). La sûreté ne peut donc être utilisée que pour des véhicules immatriculés en France.

**639. Propriété-sûreté** Le droit français connaît en outre un certain nombre de sûretés reposant sur la propriété. La clause de réserve de propriété, clause subordonnant le transfert de propriété au paiement intégral du prix, est opposable aux tiers lors d'une procédure collective si deux conditions sont réunies (art. L. 621-122 C. com.). D'une part, la clause doit avoir été convenue entre les parties dans un écrit établi, au plus tard, au moment de la livraison. Il peut s'agir d'un écrit régissant un ensemble d'opérations commerciales convenues entre les parties. D'autre part, la revendication n'est possible que si le bien se retrouve en nature au moment de l'ouverture de la procédure ou lorsque sa récupération peut être effectuée sans dommage pour les biens eux-mêmes et le bien dans lequel ils sont incorporés. S'agissant de biens fongibles, la revendication est possible lorsque se trouvent entre les mains de l'acheteur des biens de même espèce et de même

<sup>40</sup> Sauf s'agissant du gage de créances; cf. *Mestre/Putman/Billiau*, Droit spécial des sûretés réelles (1996), n°816.

<sup>41</sup> Pour une liste complète, v. *Mestre/Putman/Billiau*, Droit spécial ..., op. cit., n°816.

qualité. Si le bien a été vendu à un tiers de bonne foi, le prix dû par ce dernier peut être revendiqué s'il n'a pas encore été payé (art. L. 621-124 C. com.). Quant au crédit-bail, son opposabilité aux créanciers du crédit-preneur est subordonnée à une publicité qui s'effectue au moyen d'un registre tenu par le greffe du tribunal de commerce du lieu de l'entreprise (Décret n°72-665 du 4 juillet 1972).

**640. Sûretés sui generis?** Qu'en est-il de l'opposabilité des droits définis par des contrats inconnus du Code civil et pour lesquels aucun système de publicité n'est organisé par la loi ? On pourrait par exemple songer à créer une sûreté inspirée du *Sicherungseigentum* (propriété fiduciaire sans dépossession du débiteur) du droit allemand.<sup>42</sup> Si l'on considère que l'opposabilité est le principe, il ne devrait, à première vue, y avoir aucun obstacle en l'absence de règles de publicité. Néanmoins, si de telles sûretés étaient reconnues, la cohérence du système français s'en trouverait menacée. Il serait en effet dangereux de permettre aux parties de déjouer les dispositions protectrices des tiers ou du débiteur en créant des sûretés *sui generis*.<sup>43</sup> C'est la raison pour laquelle la jurisprudence tend à qualifier de gage les conventions organisant une propriété fiduciaire autres que la réserve de propriété.<sup>44</sup> Elle subordonne en conséquence leur opposabilité aux tiers aux conditions prévues pour ce contrat (notamment la dépossession du débiteur). Par ailleurs, la jurisprudence applique dans de tels cas toutes les dispositions impératives régissant le gage, notamment l'article 2078 du Code civil qui interdit la clause de voie parée (stipulant la possibilité de vendre la chose sans suivre les procédures légales) et le pacte commissaire (stipulant l'attribution de la chose au créancier à défaut de paiement).<sup>45</sup> Une telle méfiance à l'égard de l'opposabilité des effets translatifs organisés par des contrats inconnus de la tradition juridique française s'était déjà manifestée à propos des clauses de réserve de propriété. Avant que la loi du 12 mai 1980 n'en consacre l'opposabilité aux tiers, la jurisprudence avait en effet écartée celle-ci au nom de la théorie de l'apparence. La « solvabilité apparente » de l'acheteur résultant de la possession justifiait l'inopposabilité de la clause aux autres créanciers.<sup>46</sup> Il faut donc tempérer quelque peu l'affirmation selon laquelle l'opposabilité des effets translatifs ou constitutifs de droits réels serait de principe en droit français. Il semble en effet que la jurisprudence n'hésite pas à écarter l'opposabilité d'un tel effet aux tiers lorsque la protection de ces derniers n'est pas suffisamment assurée.

**641. L'application du principe dans les opérations transfrontalières** La loi d'autonomie peut jouer un certain rôle dans la détermination des droits réels transmis ou créés par

<sup>42</sup> § 930 BGB.

<sup>43</sup> Sur la question savoir s'il peut y avoir des sûretés réelles sans texte, cf. *Mestre/Putman/Billiau*, Droit commun des sûretés réelles (1996) n° 238.

<sup>44</sup> *Cabrillac/Mouly*, Droit des sûretés<sup>6</sup> (2002) n° 530.

<sup>45</sup> Par ex., *Cass.com.* 13 janv. 1965, Bull. n° 41. Il pourrait en aller autrement en ce qui concerne les choses dont la cession est soumise à des conditions d'opposabilité et auxquelles l'article 2078 du Code civil n'a pas lieu de s'appliquer. Un arrêt récent semble ainsi avoir admis la cession fiduciaire de créances futures: *Cass.civ. I*, 20 mars 2001, Bull. n° 11; D. 2001.J. 3110 n. L. Aynès.

<sup>46</sup> Cf. *Cabrillac/Mouly*, *op. cit.*, n°532.

contrat. La question de savoir si un droit a été acquis par acte juridique est en effet soumise à la loi choisie par les parties.<sup>47</sup> La *lex rei sitae* détermine néanmoins les prérogatives qui s'attachent aux droits portant sur un bien. Elle précise notamment quels sont les droits du créancier gagiste ou hypothécaire.<sup>48</sup> De plus, l'opposabilité de cette acquisition aux tiers est toujours régie par la *lex rei sitae* à laquelle les tiers se fient naturellement.<sup>49</sup> Lorsque la loi française subordonne l'opposabilité d'un droit à l'accomplissement d'une formalité (publication, dépossession, rédaction d'un écrit etc.), elle s'applique par conséquent à tous les biens, meubles ou immeubles, situés en France.<sup>50</sup> La question du fondement de cette compétence de la *lex rei sitae*, règle de conflit<sup>51</sup> ou loi de police,<sup>52</sup> est controversée. Sa portée exacte est donc également sujette à discussion, mais il n'en est pas moins certain qu'elle aura une vocation assez générale à régir le contenu et l'opposabilité des droits réels aux tiers. En matière mobilière, le conflit mobile qui se pose en cas de transport du meuble d'un pays à l'autre est donc généralement résolu par l'application successive des lois nationales concernées.

**642. Publicité foncière** En matière immobilière, il faut en outre tenir compte des règles régissant la publicité foncière. L'article 4 du décret n° 55-22 du 4 janvier 1955 permet la publication d'actes juridiques établis à l'étranger. Les actes doivent néanmoins (i) émaner d'officiers publics ou ministériels étrangers; (ii) avoir été «légalisés» par le ministère français des affaires étrangères; (iii) comporter toutes les mentions exigées par la loi française; et (iv) être traduits en français par un interprète habilité. Ces dispositions ne s'appliquent pas aux hypothèques. L'article 2128 du Code civil dispose en effet que les «contrats passés en pays étranger ne peuvent donner d'hypothèque sur les biens en France». La disposition peut paraître anachronique et son abrogation est souhaitée de longue date en doctrine.<sup>53</sup>

**643. Les transactions immobilières** Pour rendre un droit réel immobilier portant sur un immeuble situé en France opposable aux tiers, le recours à un notaire français est en pratique indispensable ou, à tout le moins, plus commode que les procédures permettant de publier des actes étrangers. De plus, le droit français régira nécessairement le contenu des droits réels portant sur un immeuble français. Mais cela n'empêche pas la constitution de sûretés immobilières au profit de créanciers étrangers, ni le choix d'une loi étrangère pour régir le contrat principal.<sup>54</sup> Un contrat de prêt passé à l'étranger

<sup>47</sup> Cass.civ. I, 21 juillet 1987, Bull. n°239.

<sup>48</sup> Cass.civ. 8 juill. 1969, arrêt DIAC, Grands arrêts de la jurisprudence de droit international privé<sup>4</sup> (2001) n°48.

<sup>49</sup> Mayer/Heuzé, Droit international privé<sup>7</sup> (2001) n°651.

<sup>50</sup> Cass.civ. I, 3 mai 1973, Bull. n° 143.

<sup>51</sup> En ce sens, la majorité des auteurs (cf. les références citées par Ancel/Lequette, op. cit., p. 451) et, semble-t-il, la jurisprudence de la Cour de cassation.

<sup>52</sup> En ce sens, Mayer/Heuzé, op.cit., n°646 et s.

<sup>53</sup> La conformité de ce texte au droit communautaire est de surcroît douteuse (v. Cabrillac/Mouly, op.cit., n° 790).

<sup>54</sup> Cf., Cass.civ. I, 19 janv. 1999, Bull. n°21: prêt régi par le droit suisse, accordé par une banque

devra simplement être réitéré devant un notaire français pour pouvoir donner lieu à l'inscription d'une hypothèque.

**644. L'inefficacité fréquente, en France, des sûretés mobilières de droit étranger** En matière de sûretés mobilières, les divergences de législation donnent lieu à un contentieux relativement important et semblent constituer un obstacle sérieux au bon fonctionnement du marché commun. Une entreprise étrangère qui voudrait vendre à crédit des biens mobiliers à des clients situés en France ne saurait utiliser des sûretés de son droit local qui ne seraient pas reconnues en droit français. Et même si la sûreté existe dans les deux droits, elle doit respecter les conditions de validité et d'opposabilité imposées par le droit français. C'est ce que montre l'exemple suivant. Une entreprise allemande, la Société Heinrich Otto, avait vendu des fibres de polyester à la société française Filature et tissage Carlos Dorget. Les contrats, soumis au droit allemand, réservaient la propriété des marchandises au vendeur jusqu'à complet paiement du prix et même celle des produits fabriqués après transformation des matières livrées (*verlängerter Eigentumsvorbehalt*, § 449 du BGB). En droit français, l'opposabilité de la clause de réserve de propriété aux tiers suppose néanmoins, en cas de procédure collective, que le bien existe encore en nature chez l'acquéreur (art. L. 621-22 C. com.). La Cour de Cassation, saisie du litige opposant le vendeur à l'administrateur de l'acheteur mis en redressement judiciaire a jugé que «les conditions auxquelles peuvent être revendiquées des marchandises vendues avec réserve de propriété sont, en cas de redressement judiciaire de l'acheteur, déterminées par la loi de la procédure collective, quelle que soit la loi régissant la validité et l'opposabilité, en général, de la clause de propriété réservée». <sup>55</sup> La réserve de propriété était donc inopposable aux tiers en application du droit français, intervenant comme loi de police.

**645. La Directive 2000/35/EC** La Directive 2000/35/EC sur la lutte contre le retard de paiement dans les transactions commerciales n'apporte qu'un remède partiel à ce problème. Elle dispose, en effet, dans son article 4 que «les Etats membres prévoient, conformément aux dispositions nationales applicables en vertu du droit international privé, que le vendeur peut conserver la propriété des biens jusqu'au paiement intégral lorsqu'une clause de réserve de propriété a été explicitement conclue entre l'acheteur et le vendeur avant la livraison des biens». La référence ainsi faite aux règles du droit international privé semble exclure l'intervention de la loi des procédures collectives en tant que loi de police, mais elle n'interdit pas que la *lex rei sitae* soit désignée par la règle de conflit de lois. <sup>56</sup>

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suisse à un ressortissant français avec constitution, devant notaire français, d'une hypothèque sur un immeuble situé en France.

<sup>55</sup> Cass.civ. I, 8 janv. 1991, Bull. n°9.

<sup>56</sup> D'autant que le Règlement 1346/2000 relatif aux procédures d'insolvabilité semble imposer, à titre de règle de conflit, la compétence de la loi de la procédure collective. Il dispose en son article 4 que «la loi applicable à la procédure d'insolvabilité et à ses effets est celle de l'État membre sur le territoire duquel la procédure est ouverte» et que cette loi détermine «les règles relatives à la nullité, à l'annulation ou à l'inopposabilité des actes préjudiciables à l'ensemble des créanciers».

646. **Les arrêts DIAC et Fristol** Les inconvénients du conflit mobile peuvent également toucher des créanciers qui n'ont nullement participé à une opération transfrontalière et qui ne se sont donc pas souciés des risques juridiques résultant d'un conflit de lois qui n'était guère prévisible. Deux exemples tirés de la jurisprudence permettront d'illustrer cette difficulté. Dans une première affaire,<sup>57</sup> la Société allemande DIAC avait financé l'achat d'un véhicule automobile par une autre société allemande, la Société Eugen Schluter. Le crédit était garanti par une sûreté de droit allemand, vraisemblablement un transfert de propriété à titre de garantie (*Sicherungseigentum* ou *Besitzkonstitut*) prévu par le § 930 du BGB. Immatriculé en Allemagne, le véhicule a été ultérieurement introduit en France où un créancier français de la Société Eugen Schluter l'a saisi. La société DIAC, propriétaire du véhicule au regard du droit allemand, a demandé la mainlevée de cette saisie. Estimant que la sûreté devait s'analyser en «gage assorti d'une réserve de propriété», les tribunaux français l'ont déboutée de sa demande au motif qu'une telle sûreté serait contraire aux règles impératives régissant le gage en droit français. L'inefficacité résultait d'ailleurs déjà de l'article 2076 du Code civil qui subordonne l'opposabilité du gage aux tiers à la dépossession du débiteur. Dans une seconde affaire,<sup>58</sup> la Société néerlandaise Fristol avait vendu du matériel à une banque néerlandaise laquelle le lui avait aussitôt rétrocédé avec réserve de propriété jusqu'à complet paiement du prix. Il s'agissait donc d'un crédit garanti par la propriété du matériel. La Société Fristol a mis le matériel à la disposition d'une autre société néerlandaise qui l'a introduit en France. Dans le conflit opposant les créanciers de cette dernière société à la banque, il a été jugé que la vente avec réserve de propriété devait s'analyser, dans le cas d'espèce, en gage sans dépossession, inopposable aux tiers en application de l'article 2076 du Code civil. Ces inconvénients ne doivent pas être imputés aux règles du droit international privé qui conduisent à sacrifier la sécurité juridique du créancier étranger muni d'une sûreté. La compétence de la loi de la situation des biens permet en effet de protéger les tiers qui se fient naturellement à cette loi et qui ne méritent pas moins d'égards que le créancier. En définitive, «seule l'unification du droit des sûretés mobilières permettrait de surmonter le problème».<sup>59</sup>

### (3.) La Responsabilité des Tiers qui Portent Atteinte aux Droits Nés du Contrat

647. **Le principe de la responsabilité du tiers qui porte sciemment atteinte à un droit contractuel** La jurisprudence française a posé le principe selon lequel le tiers qui porte sciemment atteinte à un droit issu du contrat commet une faute délictuelle. Nous exposerons les conditions d'application de ce principe avant d'analyser sa portée dans les opérations transfrontalières. Si la contradiction apparente entre l'article 1165 du Code civil et la protection des droits contractuels contre le fait des tiers n'a jamais empêché la jurisprudence française de sanctionner les actes malhonnêtes ou frauduleux

<sup>57</sup> Arrêt DIAC, Cass.civ. I, 8 juill. 1969, Bull. n°268.

<sup>58</sup> Cass.civ. I, 3 mai 1973, Bull. n°143.

<sup>59</sup> *Ancel/Lequette*, Grands arrêts de la jurisprudence française de droit international privé<sup>4</sup> (2001) 456. Et ces auteurs d'ajouter que «eu égard à l'extrême diversité des solutions positives, il s'agit là fort probablement d'un «rêve»(Mezger, note Rev. crit. 1974. 109)».

des tiers, elle a néanmoins provoqué un certain embarras quant au fondement de ces solutions.<sup>60</sup> La théorie de l'opposabilité du contrat, s'appuyant notamment sur l'idée que tout droit subjectif mérite d'être protégé à l'égard de tous, a permis de surmonter cette difficulté. Au nom de l'opposabilité, doctrine et jurisprudence s'accordent aujourd'hui pour sanctionner le fait des tiers sur le terrain de la responsabilité délictuelle. La Cour de Cassation a en effet décidé, à plusieurs reprises, que «toute personne, qui, avec connaissance, aide autrui à enfreindre les obligations contractuelles pesant sur elle, commet une faute délictuelle à l'égard de la victime de l'infraction».<sup>61</sup> Il résulte de cette règle jurisprudentielle que la faute est composée d'un élément matériel, aider autrui à enfreindre ses obligations contractuelles, et d'un élément moral ou subjectif, la connaissance par le tiers de l'existence de ces obligations.

**648. Élément matériel** En ce qui concerne l'élément matériel, les termes «aider autrui» évoquent la complicité entre le tiers et le débiteur. Le plus souvent la faute du tiers consiste en effet en la conclusion d'un contrat avec le débiteur qui est incompatible avec les engagements antérieurs de ce dernier. Le tiers achète une chose promise à autrui, il embauche un salarié lié par une clause de non-concurrence, etc. Un tel contrat ne pouvant être conclu que par la volonté commune des parties, le tiers apparaît effectivement comme le complice du débiteur. S'agit-il néanmoins d'une condition nécessaire pour caractériser la faute du tiers? On peut en douter. Si le tiers empêche un débiteur de bonne foi d'exécuter ses obligations, son comportement ne paraît pas moins condamnable que lorsqu'il se rend complice d'une inexécution imputable au débiteur.<sup>62</sup> Il faut également que le débiteur ait «enfreint ses obligations contractuelles». La faute délictuelle du tiers suppose donc l'inexécution du contrat par le débiteur. Un acte qui est *a priori* licite ne devient pas illicite pour la seule raison qu'il serait contraire aux stipulations d'un contrat auquel l'auteur de cet acte est étranger. Cette condition semble être une conséquence nécessaire du principe de l'effet relatif du contrat. En effet, le tiers n'est pas lié par le contrat. Il doit seulement respecter les droits et obligations que le contrat a valablement fait naître entre les parties. C'est ainsi que peuvent s'expliquer les solutions admises, après quelques hésitations, en matière de réseaux de distribution. Le tiers qui méconnaît les droits d'exclusivité dont bénéficie, à sa connaissance, le membre d'un réseau de distribution n'engage pas sa responsabilité envers celui-ci lorsqu'il a acquis les marchandises sur un marché parallèle.<sup>63</sup> Dans ce cas, il n'a, en effet, aidé personne à enfreindre ses obligations contractuelles et il n'était pas lié par le contrat de réseau. Il devait certes respecter les obligations contractuelles qui en résultaient, mais il n'avait pas

<sup>60</sup> Viney, Introduction à la responsabilité, Traité de droit civil<sup>2</sup> (1995), n°202.

<sup>61</sup> V. not., Cass.com. 11 oct. 1971, D. 1972. 120; Cass. com. 13 mars 1979, D. 1980. 1 n. Y. Serra.

<sup>62</sup> Le plus souvent, un tel fait sera de toute façon illicite, mais il n'en va pas nécessairement toujours ainsi. Cf. Cass.civ. I, 26 janv. 1999, Bull. n°32; Rev. trim. dr. civ. 1999. 405 obs. Jourdain. En l'espèce, un associé avait provoqué la dissolution de la société débitrice. Pour une présentation différente de la question de l'exigence d'une complicité, cf. Viney, op. cit., n°207-3.

<sup>63</sup> Par ex. Cass.com. 16 févr. et 12 juill. 1983, Bull. n° 59 et 207.

à respecter un monopole qu'un contrat, créateur d'obligations entre les seules parties, était impuissant à créer.<sup>64</sup>

**649. Élément moral** Quant à l'élément moral de la faute, les arrêts de principe précités de la Cour de Cassation indiquent que le tiers doit avoir agi «avec connaissance». En règle générale, cela signifie que le tiers doit avoir eu une connaissance effective du contrat. Il ne suffit pas qu'il ait pu en avoir connaissance. La jurisprudence concilie ainsi l'objectif de protéger les droits contractuels avec l'impératif de sécurité juridique.<sup>65</sup> L'étude de la jurisprudence fait néanmoins apparaître que l'élément moral de la faute peut être entendu plus ou moins strictement en fonction des circonstances. Ainsi, lorsque dans une profession, des clauses de non-concurrence sont fréquentes, commet une faute l'employeur qui a embauché un salarié sans se renseigner sur l'existence d'une telle clause.<sup>66</sup> Une telle obligation de se renseigner a en revanche été expressément écartée en matière immobilière, où une consultation du fichier de la publicité foncière est toujours jugée suffisante.<sup>67</sup> Parfois, la connaissance est jugée insuffisante pour caractériser la faute du tiers. Il en va notamment ainsi lorsque le bénéficiaire d'une clause d'exclusivité contenue dans une convention d'affacturage recherche la responsabilité d'une banque cessionnaire d'une créance cédée en violation de cette clause. Dans ce cas, il a été jugé que seule une fraude, donc, semble-t-il, la conscience de nuire au bénéficiaire de la clause, serait constitutive d'une faute.<sup>68</sup> Se contenter de la connaissance du contrat par la banque reviendrait, en effet, à exiger d'elle qu'elle mette en place des procédures lourdes et coûteuses de vérification.<sup>69</sup> Pour résumer ces solutions, il semble plus exact de dire que c'est la fraude ou la mauvaise foi du tiers, résultant en règle générale de la connaissance qu'il avait du contrat méconnu, qui constitue l'élément moral ou subjectif de la faute.<sup>70</sup>

**650. Réparation** Lorsque la faute du tiers est caractérisée, sa responsabilité envers le créancier est engagée. Le plus souvent, le juge accordera alors des dommages et intérêts pour réparer le préjudice subi. Néanmoins, en cas d'acquisition d'un bien immobilier au mépris d'une acquisition antérieure non publiée, le préjudice causé au premier acquéreur par la faute du second acquéreur de mauvaise foi sera sanctionné par l'interdiction pour

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<sup>64</sup> Cf., *Ghestin/Jamin/Billiau*, Les effets, op.cit., n°736.

<sup>65</sup> Cf. *Viney*, op.cit., n°207-2.

<sup>66</sup> Cass.com. 7 févr. 1995, JCP 1995.II. 22411, n. *Le Tourneau*; D. 1997, Somm. p. 1311, obs. *Serra*; Cass.com. 18 déc. 2001, D. Aff. 2002. 644, obs. *Chevrier* (*a contrario*, relevant que le caractère usuel des clauses n'était pas invoqué devant les juges du fond).

<sup>67</sup> Cass.civ. III, 28 mai 1979, Bull. n°116.

<sup>68</sup> Cass.com. 3 janv. 1996, Bull. n°2.

<sup>69</sup> Ce même souci de ne pas alourdir de façon excessive le mécanisme de la cession de créances professionnelles semble inspirer un autre arrêt qui refuse de retenir la responsabilité d'une banque cessionnaire pour violation d'une clause subordonnant la cession de la créance à l'agrément du débiteur, cf. Cass.com. 21 nov. 2000, Défr. 2001.635, obs. *Billiau*. Depuis la loi «NRE» n°2001-420 du 15 mai 2001, les clauses interdisant la cession d'une créance sont nulles (art. 442-6 C. comm.).

<sup>70</sup> Cf. *Wintgen*, op. cit., n°215 s.

ce dernier de se prévaloir du défaut de publicité.<sup>71</sup> Le premier acquéreur peut donc revendiquer la propriété de l'immeuble. En cas de violation d'un pacte de préférence ou d'une promesse unilatérale de vente, une réparation en nature serait également concevable. La Cour de Cassation refuse, cependant, la substitution du bénéficiaire au tiers acquéreur de mauvaise foi, alors que de nombreux auteurs y sont favorables.<sup>72</sup> L'annulation du contrat conclu peut toutefois être obtenue en cas de "fraude". S'agissant du pacte de préférence, la fraude suppose la connaissance par le tiers non seulement du pacte, mais également de l'intention du bénéficiaire de s'en prévaloir.<sup>73</sup> Concernant la promesse de vente, la connaissance du contrat est suffisante, mais l'annulation pourra être écartée pour d'autres raisons.<sup>74</sup>

**651. Autres aspects de l'opposabilité aux tiers en matière de responsabilité délictuelle** Pour dresser un tableau complet de l'opposabilité du contrat aux tiers sanctionnée par la responsabilité délictuelle, il faut également mentionner quelques autres aspects de ce mécanisme. En effet, la responsabilité d'un tiers envers une partie peut être mise en cause dans des situations où il n'a commis aucune faute au sens défini ci-dessus. Lorsque le droit issu du contrat est un droit réel ou un droit de propriété intellectuelle, droits qui se caractérisent par le monopole d'exploitation temporaire reconnu à leur titulaire, la responsabilité d'un tiers peut être engagée du seul fait du non-respect fautif de ce droit, sans qu'il soit nécessaire de constater une violation, par le débiteur, de ses obligations contractuelles.<sup>75</sup> Dans ce cas, le contrat est opposable au tiers en ce sens que son effet translatif se produit à l'égard de tous (cf. *supra* I.)<sup>76</sup> et le droit transmis peut être protégé par les règles spécifiques applicables (droit des marques, droit de la propriété littéraire et artistiques, droit des biens), ainsi que par la responsabilité civile délictuelle. La connaissance du contrat translatif par le tiers sera alors une circonstance parfaitement indifférente. Une atteinte à la propriété (ou à une marque, un brevet, un droit d'auteur) peut en

<sup>71</sup> Cass.civ. III, 22 mars 1968, Bull. n° 129.

<sup>72</sup> V. les références citées par *Viney/Jourdain*, Les effets de la responsabilité (2001) n°17-2.

<sup>73</sup> Par ex. Cass.civ. III, 10 févr. 1999, Bull. n°37.

<sup>74</sup> La Cour de cassation admet en effet que le promettant peut se «rétracter» pendant le délai accordé au bénéficiaire, rendant ainsi inefficace la levée d'option (v. not. Cass.civ. III, 15 déc. 1993, Bull. n° 174; Cass.civ. III, 26 juin 1996, Bull. n° 165). La vente à un tiers pouvant s'analyser en rétractation, l'annulation du contrat conclu en fraude aux droits du bénéficiaire n'a pas de sens: le bien lui échappera de toute façon. Il n'en va autrement que si le contrat conclu avec le promettant n'empêche pas la levée d'option (ex. hypothèque consentie à un tiers). L'annulation du contrat frauduleux est alors possible (cf. Cass.civ. 10 avr. 1948, D. 1948. 421).

<sup>75</sup> Cf., par ex., Cass.civ. I, 17 oct. 2000, Bull. n° 246, D. 2001.952 n. *Billiau/Moury*; JCP 2001.I. 338 obs. *Viney* (faute d'un éditeur qui a méconnu le droit d'exclusivité dont bénéficiait, à la suite d'un contrat avec l'auteur, un éditeur concurrent).

<sup>76</sup> Rappelons que l'inopposabilité pouvant résulter des règles de publicité ne peut être invoquée que par ceux qui sont protégés par ces règles: ceux qui ont acquis un droit de celui qui apparaissait comme son titulaire et, dans une certaine mesure, les créanciers. L'auteur d'une atteinte à l'intégrité d'un bien ou d'une contrefaçon ne peut pas s'en prévaloir pour échapper à sa responsabilité envers le titulaire du droit lésé.

effet être considérée comme fait générateur de responsabilité sans qu'il importe de savoir si l'auteur de l'atteinte avait ou non connaissance de l'identité du titulaire du droit. La transgression du droit suffit pour retenir la faute.<sup>77</sup> Plus généralement, lorsqu'un fait générateur de responsabilité (faute, fait d'une chose, fait d'autrui) est caractérisé, la preuve du préjudice subi peut être rapportée grâce à un contrat.<sup>78</sup> Il en va bien sûr ainsi lorsque l'exécution du contrat a été empêchée. Le créancier subit alors un préjudice dont la nature purement économique ne fait pas obstacle à la réparation, du moins en principe.<sup>79</sup> Mais le préjudice peut également résulter de la perte, par le créancier, de certains profits qui auraient pu résulter du contrat, sans qu'il y ait pour autant inexécution (ex.: le membre d'un réseau de distribution perd des profits à la suite d'une pratique commerciale illicite de la part d'un concurrent). Lorsque le contrat intervient seulement pour établir le préjudice subi par le créancier, sa connaissance par le tiers, au moment où il commet le délit ou quasi-délit, est évidemment une circonstance indifférente.

**652. La portée du principe dans les opérations transfrontalières** C'est en principe la *lex loci delicti*, loi du pays dans lequel le délit a été commis, qui s'applique à l'action en responsabilité délictuelle.<sup>80</sup> En cas de dispersion des éléments constitutifs du délit et notamment lorsque le lieu où le fait fautif a été commis et le lieu où il a produit ses conséquences dommageables ne coïncident pas, les deux lois ont vocation à s'appliquer et le juge doit choisir celle qui présente les liens les plus étroits avec la situation litigieuse.<sup>81</sup> On s'est demandé s'il fallait apporter un correctif à cette règle lorsqu'elle conduit à désigner une loi autre que celle du lieu où la faute a été commise et que cette loi compétente qualifie de faute un fait licite au regard de la loi locale. La réponse à cette question ne s'impose pas avec évidence. Lorsque le dommage est prévisible, on pourrait soutenir que l'auteur du délit doit respecter la législation du pays dans lequel le dommage se produit.<sup>82</sup> Il résulte de ces règles qu'il est difficile, voire impossible pour les acteurs économiques de prévoir la loi applicable lorsque le lieu de la faute et le lieu du préjudice ne coïncident pas ou lorsque la faute consiste en la conclusion d'un contrat entre personnes situées dans des pays différents. Pour écarter le risque d'une responsabilité délictuelle, il faut donc se

<sup>77</sup> Cf. Cass.civ. I, 10 mai 1995, Bull. n°203.

<sup>78</sup> Sur cet aspect de l'opposabilité, cf. les obs. de P. Jourdain, Rev. trim. dr. civ. 1999.405.

<sup>79</sup> Cf., le principe énoncé par Cass.civ. I, 26 janv. 1999, Bull. n°32; Rev. trim. dr. civ. 1999.405 obs. P. Jourdain: «le contractant, victime d'un dommage né de l'inexécution d'un contrat peut demander, sur le terrain de la responsabilité délictuelle, la réparation de ce préjudice au tiers à la faute duquel il estime que le dommage est imputable». Les tribunaux se servent néanmoins parfois de l'exigence d'un lien de causalité pour repousser des demandes d'indemnisation des conséquences indirectes et purement économiques d'un fait générateur de responsabilité. La jurisprudence se montre notamment assez réservée en ce qui concerne l'indemnisation des préjudices invoqués par les créanciers ou employeurs des victimes de dommages corporels, v. G. Viney, P. Jourdain, *Les conditions de la responsabilité*, Traité sous la dir. de J. Ghestin, LGDJ, 2<sup>e</sup> éd. 1998, n°312.

<sup>80</sup> Arrêt *Lautour*, Cass.civ. 25 mai 1948, JDI 1949.38.

<sup>81</sup> Cass.civ. I, 11 mai 1999, JCP 1999.II.10183, n. Muir-Watt.

<sup>82</sup> *Mayer/Heuzé*, Droit international privé<sup>7</sup> (2001), n°686.

conformer à toutes les lois qui seraient susceptibles de s'appliquer. Or, les législations nationales présentent des divergences non négligeables en la matière.

**653. Principes divergents dans d'autres droits européens: l'exemple du droit allemand** Le principe selon lequel la participation, en connaissance de cause, à la violation d'un contrat constitue une faute délictuelle n'est pas adopté par tous les pays. Le droit anglais est relativement proche du droit français, mais admet la possibilité d'une «*defence of justification*» aux contours imprécis.<sup>83</sup> Le droit allemand, en revanche, adopte un principe diamétralement opposé à celui qui prévaut en droit français. L'atteinte aux droits personnels ne constitue pas une faute au sens du § 823 I du BGB.<sup>84</sup> Dès 1904, le *Reichsgericht* consacre ce principe<sup>85</sup> en se fondant sur la nature du rapport d'obligations: «les droits du créancier sont seulement des droits contre le débiteur et, par conséquent, les tiers n'ont pas à en tenir compte».<sup>86</sup> L'arrêt signale également que le refus de considérer la créance comme un «autre droit» au sens du § 823 I BGB ne prive pas ce droit de toute protection. Le créancier peut généralement rechercher la responsabilité contractuelle du débiteur et le tiers peut être responsable lorsqu'il a commis un délit indépendamment de la violation du contrat.<sup>87</sup> Ce principe est tempéré par une application du § 826 du BGB<sup>88</sup> lorsque le comportement du tiers apparaît comme contraire aux bonnes mœurs, ce qui est, à vrai dire, admis assez facilement, surtout dans des situations de concurrence commerciale.<sup>89</sup> Il reste néanmoins qu'à la différence du droit français, la participation, en connaissance de cause, à la violation d'un contrat (*bewusstes Ausnutzen fremden Vertragsbruchs*) n'est pas à elle seule jugée contraire aux bonnes mœurs.

**654. Enjeux pratiques: l'exemple des réseaux de distribution** L'efficacité des réseaux de distribution sélective et exclusive, ainsi que leur incidence sur la concurrence dépendent dans une large mesure de la protection délictuelle qui leur est accordée. Or, le droit communautaire, qui régit aujourd'hui les conditions de licéité de ces réseaux, ne se préoccupe pas de la question de la responsabilité du tiers qui y porte atteinte. Une harmonisation communautaire peut paraître souhaitable en cette matière, d'autant que les approches des divers droits nationaux ne semblent pas fournir de solutions tranchées. En France, la jurisprudence avait d'abord considéré que le seul fait de commercialiser en connaissance de cause un produit hors réseau était constitutif d'une faute délictuelle.<sup>90</sup>

<sup>83</sup> Cf. *Glamorgan Coal Co. Ltd. v. Wale's Miners Federation* [1903] 2 K.B. 545, 574-575.

<sup>84</sup> «Quiconque porte illicitement atteinte, intentionnellement ou par imprudence, à la vie, à l'intégrité corporelle, à la santé, à la liberté, au droit de propriété ou à un autre droit d'autrui est tenu envers autrui de réparer le dommage qui en résulte.»

<sup>85</sup> RG 29 févr. 1904, RGZ 57, 353.

<sup>86</sup> *Ibid.*, p. 356.

<sup>87</sup> *Ibid.*, p. 357 et 358.

<sup>88</sup> «Quiconque cause intentionnellement et de façon contraire aux bonnes mœurs un dommage à autrui doit le réparer».

<sup>89</sup> Le standard des bonnes mœurs est entendu plus strictement en matière commerciale, v. *Baumbach/Hefermehl, Wettbewerbsrecht*<sup>22</sup> (2001), n°697s.

<sup>90</sup> Cass.com. 25 avr. 1968, Bull. n° 130.

Aujourd'hui, elle considère, en revanche, que la commercialisation n'est illicite que si elle s'accompagne de pratiques commerciales illicites ou si les produits ont été acquis, en connaissance de cause auprès d'un membre du réseau violant ses engagements.<sup>91</sup> La jurisprudence allemande a connu une évolution semblable. Après avoir décidé que l'avantage concurrentiel obtenu par la commercialisation des produits hors réseau constituait à lui seul une circonstance aggravante de nature à justifier la responsabilité du tiers, elle considère, depuis 1999, que seule l'acquisition frauduleuse ou par incitation d'un membre du réseau à violer ses engagements est fautive.<sup>92</sup>

Malgré cette évolution analogue que les jurisprudences française et allemande ont connue, plusieurs obstacles pour le marché intérieur peuvent se présenter dans de pareils cas. Supposons qu'un fabricant français de produits de marque a conclu un contrat de distribution exclusive avec un commerçant allemand, obligeant ce dernier à ne vendre ses produits qu'à des utilisateurs finaux. Quand le commerçant vend ses produits en violation des clauses contractuelles à un autre commerçant allemand (ce qui vaudrait seulement la peine si l'autre commerçant s'est déclaré d'accord d'acheter une grande quantité), ce deuxième commerçant ne commet une faute délictuelle ni par le seul achat, ni par la seule revente. Bien qu'il ne peut inciter un membre du réseau de distribution exclusif à violer ses engagements, il n'est pas interdit de tirer profit d'une violation d'un engagement contractuel, commise par un autre commerçant. Parce que le fabricant français ne dispose pas d'une action en responsabilité délictuelle contre ce deuxième commerçant, il peut être incliné à n'exporter vers l'Allemagne qu'avec une certaine réticence. Plus important, la situation juridique se présente d'une autre façon quand le deuxième commerçant réimporte les produits de marque en France. Suivant le droit français, ce deuxième commerçant commet un acte illicite ce qui peut mener le fabricant à introduire une action en dommages-intérêts contre lui. Cette constatation porte à croire qu'une réimportation n'aura pas lieu.

#### (4.) La Responsabilité des Parties envers les Tiers

**655. La portée du principe de l'assimilation des fautes contractuelle et délictuelle en droit français** L'exécution d'un contrat peut avoir des conséquences dommageables pour des tiers, notamment lorsqu'elle est défectueuse. Le tiers peut-il, dans cette hypothèse, obtenir réparation sur le terrain de la responsabilité délictuelle? Le droit français répond en principe par l'affirmative à cette question. Nous examinerons la portée du principe de l'assimilation des fautes contractuelle et délictuelle en droit français et sa portée dans les opérations transfrontalières. La Cour de Cassation a posé le principe selon lequel toute faute contractuelle constitue une faute délictuelle à l'égard des tiers, mais ce principe est assorti d'un certain nombre de tempéraments.

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<sup>91</sup> Cass.com. 16 févr. 1983, Bull. n° 69.

<sup>92</sup> BGH 1<sup>er</sup> déc. 1999, WRP 2000, 734.

**656. Les fautes délictuelles à l'égard des tiers commises dans l'exécution d'un contrat**  
L'inexécution d'un contrat peut certainement constituer une faute délictuelle à l'égard des tiers lorsque le comportement du débiteur constitue une violation, non seulement du contrat, mais également d'une norme de conduite sanctionnée sur le terrain de la responsabilité délictuelle. C'est là une manifestation de l'idée que le contrat, son exécution ou son inexécution constituent des faits qui peuvent être appréhendés par des règles de droit diverses et notamment par la responsabilité délictuelle. La jurisprudence l'a toujours admis, notamment lorsque le débiteur a violé une obligation légale ou lorsque, par imprudence ou négligence, il a porté atteinte aux biens ou à l'intégrité physique d'un tiers.

**657. L'assimilation des fautes contractuelle et délictuelle** Plus controversée est la question de savoir si toute inexécution du contrat doit constituer une faute délictuelle à l'égard des tiers. En faveur d'une telle assimilation, on fait valoir que les termes très généraux de l'article 1382 du Code civil n'invitent guère à distinguer entre les fautes et que l'inexécution d'un contrat constitue la violation d'une règle dont la force obligatoire est consacrée par la loi. On soutient également que si l'opposabilité par les parties aux tiers implique que ces derniers commettent une faute délictuelle en portant atteinte au contrat, l'opposabilité par les tiers aux parties devrait impliquer, de façon analogue, que les parties commettent une faute délictuelle si l'inexécution est préjudiciable pour les tiers. De plus, la notion de faute «envisagée en elle-même, en dehors de tout point de vue contractuel» n'aurait pas de signification réelle. Ce dernier argument semble d'ailleurs fondé au regard du droit positif. Depuis quelques décennies, la jurisprudence s'est souvent montrée peu exigeante en ce qui concerne l'appréciation de la faute délictuelle commise lors de l'inexécution d'un contrat. Malgré l'affirmation d'une indépendance des deux fautes et l'existence de quelques arrêts refusant l'assimilation, on a pu affirmer, dès 1968, qu'au regard des arrêts de la Cour de Cassation «il est de principe qu'une faute contractuelle est en même temps une faute délictuelle à l'égard des tiers.»<sup>93</sup> La Cour de Cassation, par plusieurs arrêts récents, vient de consacrer le principe selon lequel «les tiers à un contrat sont fondés à invoquer l'exécution défectueuse de celui-ci lorsqu'elle leur a causé un dommage»<sup>94</sup> et ce «sans avoir à apporter d'autre preuve»,<sup>95</sup> l'obligation inexécutée serait-elle de résultat.<sup>96</sup> La Cour de Cassation s'est ainsi clairement ralliée à la thèse de l'assimilation des fautes contractuelle et délictuelle. Bien que ces arrêts se veuillent assurément de principe, il est permis de s'interroger sur leur portée. Leur date récente, le fait qu'ils émanent de la seule Première chambre civile de la Cour de

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<sup>93</sup> *Durry*, Rev. trim. dr. civ. 1974. 815.

<sup>94</sup> Cass.civ. I, 15 déc. 1998, Bull. n° 368.

<sup>95</sup> Cass.civ. I, 18 juill. 2000, Bull. n° 221; 13 févr. 2001, Bull. n° 35.

<sup>96</sup> Lorsque l'obligation contractuelle est de résultat, il suffit de prouver que le résultat promis n'a pas été réalisé pour engager la responsabilité du débiteur. Ce dernier ne peut s'exonérer de sa responsabilité qu'en apportant la preuve d'un cas de force majeure.

Cassation,<sup>97</sup> ainsi que les vives critiques doctrinales qui leur ont été adressées<sup>98</sup> incitent, à cet égard, à la prudence.

**658. Incidence du principe du non-cumul** En droit français, la responsabilité délictuelle ne peut être utilisée lorsque la victime dispose d'une action en responsabilité contractuelle contre l'auteur du dommage. C'est la fameuse règle du non-cumul. La question de savoir si une faute contractuelle peut également constituer une faute délictuelle ne se pose, en conséquence, que lorsque la victime ne dispose d'aucune action de nature contractuelle. Elle ne se pose donc pas dans les rapports entre créancier et débiteur. Le principe du non-cumul souffre d'une exception au profit des tiers qui sont bénéficiaires d'une stipulation pour autrui expresse ou tacite. La possibilité, pour ces tiers, de renoncer à la stipulation pour autrui, leur ouvre une option entre l'action contractuelle et l'action délictuelle.<sup>99</sup> Cette exception a néanmoins une portée limitée. A la différence du droit allemand, le droit français ne fait plus, aujourd'hui, qu'un usage limité des stipulations pour autrui tacites pour protéger certains tiers, victimes d'une inexécution<sup>100</sup> et la facilité avec laquelle les tiers peuvent obtenir réparation sur le terrain délictuel ôte à ce mécanisme presque tout intérêt pratique. Le principe du non-cumul s'applique, en revanche, en présence d'une action directe fondée sur le contrat. Le titulaire d'une telle action ne pourra donc pas invoquer les règles de la responsabilité délictuelle contre le débiteur fautif. Son action est «nécessairement contractuelle».<sup>101</sup>

**659. Portée des actions directes nécessairement contractuelles** Les actions directes en responsabilité sont une création jurisprudentielle qui remonte au XIXe siècle.<sup>102</sup> A une époque où les conditions de la responsabilité délictuelle étaient entendues plus strictement qu'elles ne le sont aujourd'hui, la jurisprudence a notamment permis la transmission à l'acquéreur d'une chose des actions en garantie dont disposait son vendeur. L'action directe en responsabilité avait donc initialement pour but d'offrir au sous-acquéreur une indemnisation qu'il n'aurait pas pu obtenir sur le terrain de la responsabilité délictuelle.<sup>103</sup> Avec l'assimilation des fautes contractuelle et délictuelle, la fonction de l'action directe a changé. Le jeu combiné de l'action directe et du principe du non-cumul permet désormais de mieux respecter les prévisions des parties. Le débiteur répond de l'inexécution envers les tiers titulaires d'une action directe aux mêmes conditions qu'envers le créancier. S'inspirant de la théorie doctrinale des «groupes de contrats», la Cour de Cassation avait décidé, il y a quelques années, de généraliser le mécanisme en l'appliquant à tous ceux qui étaient indirectement lié au débiteur fautif. Un arrêt de

<sup>97</sup> Un arrêt de l'Assemblée plénière de la Cour de cassation en date du 17 novembre 2000 (Bull. n° 9) semble certes s'inspirer de cette nouvelle jurisprudence, mais il ne reproduit pas pour autant l'attendu de principe que l'on trouve dans les arrêts précités.

<sup>98</sup> Cf. not. *Jourdain*, obs. sous Cass.civ. I, 18 juill. 2000, Rev. trim. dr. civ. 2001. 146; *Viney*, JCP 2001.I. 338 n°11.

<sup>99</sup> Par ex., Cass.civ. II, 23 janv. 1959, *Grands arrêts de la jurisprudence civile*,<sup>11</sup> (2000) n°263-265.

<sup>100</sup> Cf. not. *Viney*, *op. cit.*, n°188.

<sup>101</sup> Cass.civ. I, 9 oct. 1979, Bull. n°241.

<sup>102</sup> Sur les actions directes, v. *Jamin*, La notion d'action directe (1991), *passim*.

<sup>103</sup> *Ghestin/Jamin/Billiau*, *op. cit.*, n° 1141.

l'Assemblée plénière de la Cour de Cassation en date du 12 juillet 1991<sup>104</sup> a néanmoins condamné cette généralisation. Aujourd'hui, seuls les sous-acquéreurs d'une chose sont titulaires d'actions directes nécessairement contractuelles contre les fabricants, constructeurs et vendeurs intermédiaires.<sup>105</sup> Ils se voient ainsi privés de l'action délictuelle dont ils disposeraient sur le fondement de l'opposabilité des contrats.

**660. La portée du principe dans les opérations transfrontalières** Les règles relatives à la loi applicable en matière de responsabilité délictuelle pourront conduire à une vocation concurrente de la loi du pays où le fait dommageable a été commis, c'est-à-dire la loi du pays où la faute contractuelle a été commise, et la loi du pays où le dommage a été subi. On peut néanmoins penser que la loi du pays où le fait dommageable a été commis sera le plus souvent celle qui présente les relations les plus étroites avec la situation litigieuse. Il faut également tenir compte de la Convention de La Haye du 2 octobre 1973 relative à la loi applicable à la responsabilité du fait des produits. Cette convention s'applique uniquement aux rapports entre le fabricant et la victime du défaut qui n'a pas acquis le produit directement auprès du fabricant (article 1<sup>er</sup>). La convention organise un système de rattachement assez complexe. Elle désigne en premier lieu la loi du pays où le dommage s'est produit, à condition que cette loi soit également celle de la résidence de la victime directe ou celle de l'établissement principal du défendeur ou du lieu d'acquisition (art. 4). A défaut ou si la victime, qui dispose d'une option, le souhaite, la loi compétente est celle du lieu de résidence de la victime, à condition que ce soit également la loi du lieu de l'établissement principal du défendeur ou du lieu de l'acquisition (art. 5). Si les articles 4 et 5 ne peuvent recevoir application, la victime peut choisir entre la loi du lieu de l'établissement principal du défendeur et la loi du lieu où le dommage s'est produit (art. 6). L'harmonisation des droits européens par la Directive 85/374 sur la responsabilité du fait des produits défectueux n'a pas supprimé les conflits de lois dans la mesure où elle n'est pas totale et ne concerne que la responsabilité sans faute des producteurs.

**661. Les actions directes** En ce qui concerne les actions directes, leur admission doit être subordonnée, semble-t-il, à l'acquiescement de la loi du contrat d'origine,<sup>106</sup> voire des lois qui régissent les contrats de la chaîne cumulativement.<sup>107</sup> Une entreprise française qui achèterait des marchandises auprès d'un importateur français par un contrat de droit français n'aurait donc aucune action directe contre les fabricants étrangers qui auraient conclu des contrats soumis à des droits qui ignorent l'action directe. L'action délictuelle serait, dans cette hypothèse, soumise à celle des deux lois ayant vocation à s'appliquer (loi du pays du fabricant qui a commis le fait dommageable et loi du pays de l'acheteur qui a subi le dommage) avec laquelle elle présente les liens les plus étroits. Et il semble impossible de prévoir avec certitude de quelle loi il s'agira aux yeux du juge saisi. La Cour

<sup>104</sup> Cass.ass.plén. 12 juill. 1991, Bull. n° 5.

<sup>105</sup> Certaines de ces actions directes ont un fondement légal (art. 1646-1 et 1792 CC), d'autres sont consacrées par la jurisprudence. V *Ghestin/Jamin/Billiau, op. cit.*, n° 1165.

<sup>106</sup> *Heuzé*, La loi applicable aux actions directes dans les groupes de contrats, *Rev.crit.dr.int.pr.* 1996, 243.

<sup>107</sup> *Leclerc*, Les chaînes de contrats en droit international privé, *JDI* 1995.267, n°56.

de Cassation a par ailleurs décidé qu'aucune action directe ne peut être exercée sur le fondement de la Convention de Vienne lorsque celle-ci régit le contrat d'origine.<sup>108</sup> On peut donc dire que le correctif que l'action directe apporte en droit français à l'assimilation des fautes contractuelle et délictuelle risque d'être inapplicable dans de nombreuses chaînes de contrats internationaux.

C'est ce que montre l'exemple suivant, tiré d'une décision de justice non publiée. Un constructeur naval français avait vendu un paquebot à un armateur anglais. Ce contrat de vente était soumis au droit anglais. Par un contrat soumis au droit français, l'armateur anglais a revendu le paquebot à un armateur français. Un moteur du paquebot ayant été l'objet de plusieurs avaries, le sous-acquéreur français a assigné le constructeur français en réparation de son préjudice. Si les contrats de la chaîne avaient tous été soumis au droit français, cette action aurait été nécessairement contractuelle. Le constructeur aurait pu se prévaloir, par conséquent, des limitations de responsabilité valablement stipulées dans le contrat le liant à l'armateur anglais, ainsi que d'une clause attribuant la compétence aux juridictions anglaises. Or, la loi anglaise régissant le premier contrat de vente ignore l'action directe. L'action du sous-acquéreur contre le constructeur du navire était donc de nature délictuelle et les limitations conventionnelles de responsabilité étaient inapplicables.

**662. Autres aspects de l'opposabilité et détermination de la nature contractuelle ou délictuelle de l'action** La nature juridique d'une action en responsabilité engagée contre le débiteur d'une obligation contractuelle peut également dépendre d'autres aspects de l'opposabilité des contrats, notamment de l'opposabilité aux tiers de pouvoirs de représentation ou de clauses régissant des groupements de personnes.

C'est ce que montre l'exemple suivant tiré de la pratique arbitrale. Une société autrichienne et une société allemande avaient conclu un contrat de consortium pour la fabrication et mise en fonctionnement de locomotives commandées par une société française. Le contrat de consortium précisait que seule la société autrichienne aurait des rapports contractuels directs avec le client. De l'opposabilité de cette clause au client dépendait la nature contractuelle ou délictuelle de son action contre la société allemande.

**663. Les conséquences délictuelles de l'inexécution d'un contrat** Lorsqu'en application des règles exposées ci-dessus, l'action dirigée contre le débiteur est de nature délictuelle, il faut déterminer, au regard de la loi applicable à cette action, dans quelle mesure l'inexécution d'un contrat donne lieu à une responsabilité délictuelle du débiteur. Or, à ce propos, il existe des divergences considérables entre les divers droits nationaux. Le droit français n'est pas le seul à tirer de l'existence d'une inexécution contractuelle un certain nombre de conséquences sur le terrain délictuel. Le droit allemand considère par exemple que l'existence d'une obligation contractuelle d'agir est un des facteurs pouvant

<sup>108</sup> Cass.civ. I, 5 janv. 1999, Bull. n°6; D. 1999.383 n. Witz; JCP 2000.I.199, n°19, obs. Viney.

caractériser une faute délictuelle d'abstention.<sup>109</sup> De plus, lorsque l'inexécution d'un contrat porte atteinte à l'intégrité physique d'un tiers ou à ses biens, la responsabilité du débiteur pourra sans doute fréquemment être engagée et, en matière de responsabilité des produits défectueux, les droits européens ont déjà été largement harmonisés en ce sens. La règle française selon laquelle toute inexécution d'un contrat constitue *ipso facto* un fait générateur de responsabilité délictuelle à l'égard des tiers semble néanmoins être assez isolée en droit comparé. En effet, ni le droit anglais, ni le droit allemand n'admettent de façon générale la responsabilité d'un débiteur envers les tiers qui subiraient des dommages économiques du fait de l'inexécution d'un contrat. Or, les enjeux d'une telle responsabilité peuvent être considérables. Ainsi, l'Etat français avait-il recherché la responsabilité délictuelle d'un chantier naval italien dont les fautes contractuelles avaient contribué au naufrage d'un pétrolier au large des côtes françaises. En application du droit français, il pouvait prétendre à la réparation intégrale de tous les chefs de préjudices subis.

**664. Les distorsions de concurrence pouvant résulter des divergences de législation** Les règles de la responsabilité délictuelle applicables dans le pays où une entreprise a son principal marché ou ses principaux établissements pourraient avoir une incidence sur le coût de l'assurance et, partant, le coût de ses produits. De plus, en application des règles du droit international privé, la responsabilité d'une entreprise pour des dommages causés aux tiers sera fréquemment soumise à son droit local, surtout si ce droit est favorable aux victimes. Les options offertes à la victime par la Convention de la Haye sur la responsabilité des produits défectueux ou par les diverses règles nationales de droit international privé<sup>110</sup> conduiront en effet naturellement à une application plus fréquente des législations peu restrictives en matière de responsabilité délictuelle. Une entreprise française se verra donc fréquemment appliquer le droit français en vertu duquel elle sera responsable de toutes les conséquences dommageables de l'inexécution d'un contrat envers les tiers, sans avoir aucune possibilité de s'exonérer de cette responsabilité ou d'en limiter conventionnellement le montant. Ainsi, une société, délictuellement responsable pour avoir fourni, par exemple, des vis d'acier «n'ayant pas les qualités requises lors de la commande»,<sup>111</sup> y compris envers des tiers qui ne subissent qu'un préjudice purement économique (telles les entreprises participant à une opération qui prend du retard en raison du défaut de fabrication), s'exposera-t-elle à un risque de responsabilité que n'assurera pas son concurrent allemand ou anglais. Or, les inconvénients des divergences des règles applicables à la responsabilité professionnelle des entreprises sont bien connus. L'exposé des motifs de la Directive 85/374 sur la responsabilité du fait des produits défectueux énonce ainsi que «le rapprochement des législations des Etats membres en matière de responsabilité du producteur pour les dommages causés par le

<sup>109</sup> Cf. Palandt (-Heinrichs), BGB<sup>62</sup> (2003), intr. à § 249, n°84.

<sup>110</sup> Le droit international privé allemand permet par exemple aux victimes de choisir entre la loi du pays où le fait dommageable a été commis et la loi du pays où le dommage s'est réalisé (§ 40 EGBGB) et on peut penser que la règle française qui, en cas de dispersion des éléments du délit, impose au juge de rechercher la loi adéquate sera, en cas de doute, également utilisée dans un sens favorable aux victimes.

<sup>111</sup> Cf. Cass.com. 4 mai 1993, Bull. n°173.

caractère défectueux de ses produits est nécessaire du fait que leur disparité est susceptible de fausser la concurrence, d'affecter la libre circulation des marchandises au sein du marché commun». Ces considérations générales ne valent pas seulement pour la responsabilité du fait des produits dangereux pour les personnes ou les biens. Lorsque les entreprises d'un Etat membre répondent de tous les dommages pouvant résulter pour les tiers de l'inexécution d'une obligation contractuelle, alors que, dans d'autres Etats, la responsabilité des entreprises concurrentes est soumise à un régime nettement plus restrictif, les conditions de la concurrence pourraient s'en trouver faussées.

### III. Information about Foreign Law

665. **An illustration from Austria** How close-fitting the dovetailing between property law, tort law and contract law is, may be sufficiently demonstrated with the illustrations given so far in this study. There are, however, still numerous further combinations of problems in which such interferences are to hand. In order not to let the scope of this study expand further, we are content here to make do with a reference to the high risk of liability in the case of information on foreign law. An impressive example of problems arising from the non-recognition of the internal system connections of private law in economic life, is found in a decision of the Austrian OGH from the 28th March 2002.<sup>112</sup> The case shows above all, how rashly even banks can assume there is a unified legal situation in Europe, and what consequences such an error can bring with it.

A German bank awarded a German ltd. company a loan. As safety for this loan an Austrian ltd. company concluded a contract for the transfer of ownership by way of security with the German bank concerning a lorry. The lorry remained, in accordance with the agreement, in the possession of the Austrian ltd. company. This had the consequence that the German bank had not acquired ownership of the lorry under the applicable Austrian property law. This is because Austrian law considers this form of transfer of ownership by way of security, in contrast to German law, void due to a breach of the pawn principle, and therefore a breach of the public disclosure principle. The German bank had overlooked this; the thought had not at all occurred to the bank, that the legal situation in two neighbouring EU States could be so diametrically different. Following the opening of the bankruptcy proceedings relating to the property of the Austrian ltd. company, the later plaintiff contacted the German bank which explained that they would release the lorry against payment of the purchase price. The plaintiff paid the German ltd. company the purchase price and collected the lorry from the Austrian ltd. company. The administrator of the bankrupt's estate of this company finally sued successfully for the handing over of the lorry. Hereupon the purchaser of the lorry sued the German bank for compensation. The OGH granted the legal action. The German bank had falsely informed the plaintiff; it should have been aware of the differences between Austrian and German law. The OGH based the liability on § 1300 ABGB. It involves non-contractual liability for experts which also justifies a compensation

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<sup>112</sup> OGH 28th April 2002, JBl 2002, 583 = RdW 2002, 529.

claim with respect to pure economic loss in cases of mere negligence. Indeed § 1300 ABGB requires that the information is given “for a reward”, but this only means that the advice must not be given “selflessly”. This was the case here because the German bank was engaged in the valuation of its (apparent) security, and therefore pursued its own interests. Moreover, such liability for false information also exists in German law.



## Part Four: Information from Legal and Business Practice

**666. General** In order to obtain the information sought by the Commission from business practice, as described above in para. 36, we set in motion to two large-scale questionnaires for business and consumer associations in all member states. In the following pages we reproduce the text of these questionnaires. The responses to the first questionnaire are summarised in the following text. The replies to the second questionnaire, by contrast, have been included at the appropriate places across the breadth of this study and account is taken of them, therefore, in parts two and three of the study. This approach commended itself because in the second questionnaire we endeavoured to verify the practical significance of the particular points identified in our study. A general summary of responses to those very particular matters, stripped of their context, did not appear to us to be appropriate.

**667. First questionnaire round: letters to business organisations** In our first circular we addressed business, trade, industrial and professional associations. Besides the salutation and the complimentary closure, the letter had the following wording:

“The European Commission at the start of this year commissioned an international team of experts, lead and coordinated by us, to undertake a “Study on property law and non-contractual liability law as they relate to contract law” (SANCO/2002/B5/010). This study follows in the wake of the Commission’s Communication on the future of European contract law. One immediate question which has arisen – not least because of the conclusions of the European Council and a resolution of the European Parliament – is whether harmonization of private law is meaningful or adequate without incorporating important parts of non-contractual liability law and property law. Our study addresses this question and its conclusions will most likely play an important role as regards future EU legislation.

The European Commission has placed strong emphasis on obtaining information about current business practice and experience. One question in particular is whether and to what extent the existence of some sixteen (in the future: twenty-six) different legal regimes for contract law, property law and tort law hinders full exploitation of the economic possibilities of the internal market or distorts competition. We would therefore be very grateful if you could share your experiences with us and inform us about problems occurring in your sphere of activity. Information received will of course be treated as anonymous, if so desired. We are sending this letter to the most important trade associations, professional organisations and chambers of industry and commerce in the EU.

We are especially interested in obtaining answers to the following questions concerning practical difficulties in cross-border commerce within the European Union. We have deliberately drafted them on the basis that no special knowledge of European private law is required. In an appendix to this letter we explain in brief why these questions appear to us important. *We would like to stress that we do not expect anyone to answer all of these questions.* It would be quite sufficient if you could address those questions that seem relevant in your sphere of activity. Moreover, we would be grateful, of course, if you are also able to alert us to other problems of importance to you.

1. Do you know of situations in which enterprises have abstained from business transactions because they considered the risk of liability under a foreign legal system to be too high or inestimable?
2. Which risks of liability regarding imports and exports do you or, as the case may be, your members examine and how exactly is this audit carried out? Is it general practice to consider possible consequences arising from differences in the relevant legal systems?
3. Have problems occurred as regards protection of confidential information, e.g. after disclosure to the other side during negotiations which ultimately fail?
4. Are you aware of problems involving incorrect information and consequent liabilities to pay compensation, e.g. in the financial services sector?
5. Is a choice of law for the contract important or usual in your sphere of activity and, if so, what form does this choice of law usually take?
6. Are there rules in your sphere of activity which constitute a competitive disadvantage for domestic businesses in comparison to their foreign competitors and which cannot be excluded by contract?
7. Do contracts (and especially general terms and conditions) take into account the fact that the liability of the parties (quantum of damage, limitation of actions/prescription, burden of proof, liability for employees and subcontractors, etc.) may be quite different depending on whether the applicable foreign law is contractual or non-contractual?
8. What action is taken when it becomes necessary to ascertain what is the private law of another EU member state and what costs does this give rise to?
9. Have problems arisen in business transactions with foreign parties because of differences in the legal rules governing acquisition and loss of ownership of moveable property?
10. Are claims to payment in cross-border transactions normally secured differently from how they would be in purely domestic transactions? Do securities for credit in foreign transactions involve greater costs than in domestic transactions and, if so, why?
11. In particular, is credit less easily obtained and/or more expensive in countries that have a more restricted system of secured credit than in the country in which the creditor is located?
12. Which forms of security for credit commonly used in domestic transactions, are in your experience inappropriate or less suitable for foreign transactions?

13. In particular, have you encountered limitations of trade and commerce with other member states due to the different legal regimes concerning reservation of title?
14. Are special costs incurred in pursuing legal claims against parties to a contract who are located in another EU member state?"

668. **Appendix** The following appendix was enclosed with this letter and was likewise sent out with a similar letter, reproduced below, addressed to consumer associations.

*"Law of tort (or delict) and contract law*

The field of application of the law of tort (or delict) and contract law is defined differently within the various jurisdictions of the EU. A narrowly defined tort law typically results in a wide-ranging contract law and, conversely, a wide-ranging tort law typically leads to a comparatively narrow area of application of contract law. In all jurisdictions the one part of the law complements the other so that the content of each legal system can often only be appreciated by viewing both parts together. In other words, since there is no common European answer to the question what is contract law and what is tort law, the problem is likely to arise that harmonisation of law in only one of these areas could jeopardize the harmonisation of the outcomes actually desired and may even perhaps make that goal impossible of achievement. Furthermore, the question of priority of legal rules as between contract law and tort law in areas of overlap (concurrence of actions) is resolved differently in the various jurisdictions; such areas of overlap exist in all jurisdictions, though their extent will vary from country to country. There are jurisdictions in which liability to pay compensation is always either contractual or tortious and there are other legal systems which permit both claims to subsist side by side.

These differences in determining the boundaries of the field of application of contract and tort law may have legal repercussions for every stage of a transaction. They lead to different legal outcomes on one and the same set of facts if and in so far as there are significant differences between contractual liability and tortious liability. It is not merely the rules determining which national law is applicable to a tort or breach of contract and which court is competent to settle the dispute that vary from jurisdiction to jurisdiction. There can also be marked differences as regards the prerequisites for and consequences of liability for a tort or breach of contract. For example, these might relate to whether some degree of fault or breach of duty is required, whether and to what extent compensation is due for a non-economic loss, and whether there can be liability under tort law as well as under contract law for a so-called pure economic loss. Other differences might relate to the quantum of damages, the length of periods for limitation of actions (or prescription), the possibility of limiting or excluding liability by contractual agreement, and vicarious liability for employees and contractors.

Looking at the matter more closely, there is an evident and substantial divergence in the laws of the EU member states even as regards the negotiation phase for conclusion of contracts. For example, liability issues arising out of giving certain

types of information (credit references, expert reports, etc) may be assigned partly to the law of contract and partly to the law of tort. The same goes for liability for breach of some duty owed during negotiation of a contract (negotiating in bad faith, exploitation of confidential information, damage sustained by a contracting party due to the dangerous condition of premises, etc.) as well as for liability of agents acting without authority or exceeding their authority. Considerable differences exist as regards whether and to what extent tort law can be applied to a breach of contract which has caused the contractual partner property damage or personal injury. Typical cases might relate to damage to cargo or freight or failure to properly perform services within the health sector. There are even substantial differences as regards product liability. That is because the law is only harmonised in relation to ultimate consumers of the product; where not harmonised, liability for negligence remains subject to the different systems of contract law and tort law. A well-known case in point is liability for damage caused to the product itself.

European legislation directed at consumer protection and addressing issues in the law of obligations has repeatedly run up against considerable difficulties which result from the fact that the juxtaposition and interaction of contract and tort law has not been harmonised. The Consumer Sales Directive is a good example of this, as are the (hitherto unsuccessful) endeavours to harmonise liability for defective services. Moreover, a usable shared European terminology is currently missing and without this many further measures of harmonisation appear virtually unobtainable. One can point to such elemental concepts as “damage” or “breach of duty”. Furthermore, it is often cost intensive to an unmaintainable degree to ascertain foreign law. That is true for the core areas of contract law. If legal analysis extends to the interaction between the law of contract and the law of tort, these problems are multiplied.

#### *Property law and contract law*

The transfer of property is subject to divergent rules in the member states of the EU. In some states, transfer of property in specific goods takes place when the contract of sale is concluded and for generic goods when these are appropriated to the contract. In other states a transfer of possession is necessary. These differences can have practical importance for (i) the passing of risk in those states where this is tied to ownership of the property rather than possession and (ii) the time period during which the creditors of the seller and creditors of the buyer may have resort to the subject-matter of the sale by means of levying execution or as part of the estate of the bankrupt buyer or seller.

The same questions and problems arise – albeit inverted – when a contract is terminated. In some states, for example, when a contract is rescinded ownership does not automatically re-vest in a seller who no longer has possession of the goods. In most member states the acquisition of ownership of moveables is precluded if the underlying contract is void. The reasonable reliance of the purchaser in the efficacy of his acquisition is not protected in such cases. In this way the purchaser

bears the risk that the contract is invalid – even if – as in most cases – the reasons for its invalidity are attributable to the seller or his sphere of influence.

The same difficulties can emerge in relation to proprietary securities. They may develop when the security interest is created or when the contract creating the security is rescinded.

The typical means of providing security for a purchaser's indebtedness is reservation of title, but the rules on this vary across the EU. The differences relate in part to the scope of debt which may be secured. In some member states only the purchase price and claims closely connected with the sale can be secured in this way, whereas other states also permit use of reservation of title to secure other claims of the seller against the purchaser which are not related to the sale contract. Moreover, the prerequisites for reserving title also differ. In some states reservation of title requires registration; in others the sale contract must be concluded in writing. As regards its legal effects, some states regard as invalid reservations of title which allow the purchaser with the vendor's consent to dispose of the goods by further sale or processing. There are also some states in which reservation of title only has the effect of granting a security interest: if execution is levied by the seller or the purchaser is declared bankrupt, the seller is regarded as being a mere secured creditor and is not treated as the owner of the property. In a few states reservation of title can extend to a claim for the purchase price which the buyer obtains on a sub-sale or products that are manufactured out of supplied raw materials or semi-finished goods.

Similar questions arise in relation to securities for loans granted by banks and other finance companies. A pledge, whereby the debtor surrenders possession of the goods pawned to the creditor or a third party, is universally recognised in the EU, but for practical reasons this loss of possession is nowadays only acceptable in peripheral cases. More usually the debtor needs possession of the goods because it is only by selling or making use of them that he will raise the money with which he can repay the secured loan. There is a great variety of instruments available in the modern laws of the member states for creating proprietary securities without possession. These differ from state to state not just in their construction; the permissible dimensions of such securities also vary. Security interests in receivables, which for modern economies are particularly important, and their prerequisites are also subject to variation, whether they take the form of a pledge of receivables (where this is recognised), an assignment for security purposes, or some other mode.”

**669. Summary of responses** The majority of answers to the catalogue of questions sent to businesses and legal practice, came from Germany and Austria, then came Italy and Sweden. Occasionally a few associations and organisations had carried out extensive general trade and industry examinations. For instance the ‘Portuguese Trade and Tourism Office’ forwarded the catalogue of questions for this study to 200 Portuguese undertakings involved in export, and then made a summary in English of the answers received available to us. The chamber of commerce in Austria distributed our catalogue of questions to, amongst others, the chambers of commerce of the federal provinces including the federal

branches for trade and business, commerce, industry, tourism and the leisure industry, banks and insurance, transport, information and consulting, as well as to foreign trading places of the chamber of commerce in EU member states. On the other hand we received no responses from the Benelux countries and only one response from France shortly before the completion of the study. It was not always the case that all the questions were answered. Occasionally the receivers of the questions restricted the answers to very general statements, or referred us to problems lying outside of the catalogue of questions.

**670. Qn 1 (abstaining from business due to inestimable risks)** The question of whether enterprises abstained from business transactions abroad but within the EU, because the risk of liability appears too high or inestimable, was predominantly answered in the negative. This view was at least taken by enterprises and economic associations from trade and industry. In relation to the USA and Canada this was different above all because of the particularly stringent product liability of these countries. Occasionally, however, we were referred to particular liability risks within the EU, which would reduce the willingness to export. Moreover, the problem of product liability was named in this respect. Above all French law was indicated with respect to the lack of upper limits for liability and the case law on the *vices cachés*, as problematic for foreign businesses. The insurance market supplies bearable and calculable concepts for industrial firms, though. Businesses and associations in the financial services sector (banks and insurance) expressed themselves more critically. In particular German and Austrian banks and insurance companies emphasize that incalculable risks under foreign law are an everyday phenomenon for them, this giving rise to abstention from business transactions abroad. The insurers indicate that their area of business frequently lies in the covering of risks, which moves outside of contractual obligation law, for example, into tort law. An alignment or harmonisation of contractual obligation law would indeed capture the bases of the contractual relationship of the insurer with its customers, however it would not capture the cover of the respective risk intended with the contract. Consequently from the point of view of the insurer, the problems which arise from the difference of the legal systems would remain, even with an alignment of contract law. Enterprises from the building trade repeatedly cite that the regulations on guarantee liability in French law, which provide a ten year guarantee period for certain defects to constructions (art. 1792-2 CC, art. 2270 CC), and the associated obligation to conclude an insurance (Assurance R.C. décennale, Garantie-décennale) which as such is not available in other member states and which foreign businesses are not automatically able to obtain from French insurers, lead to considerable difficulties and interference in cross-border construction trade. The mandatory character of these regulations prompts foreign competitors to abstain from engaging in business in the French market. Moreover, the building trade refers to a wealth of purely factual regulations, which are outside the (contract, property and tort law) legal scope of this study, which have the effect of fundamentally impairing the free circulation of services. Different bureaucratic requirements (registering, entries, registration procedure) are named, as well as different trade law regulations and different licence conditions for manual work activities connected with them. Considerable problems exist for foreign enterprises with the application for public tenders; the requirements for partaking are here very often of such a nature that they can only be fulfilled by national enterprises.

**671. Qn 2 (auditing of particular risks of liability)** At the foreground of the enterprises' thoughts are first of all the actual possibilities and the economic meaning of business. Questions of liability always play an influential roll in this. Large and experienced enterprises which have legal departments (sometimes even in different countries) at their disposal, cope more easily than small enterprises with less experience. Experienced enterprises show with cross-border business a clearly increased consciousness of problems with respect to the legal system to be applied and its difference in terms of its contents. Questions of liability are intensively and differently studied, depending upon the extent, the size and time-scale of the business transaction as well as its general economic importance. The enterprises endeavour to keep liability risks as low as possible. This happens on the one hand purely through ensuring quality, and on the other hand through the establishing of the legal liability risks and the possibilities to limit them. With standard business transactions, on the other hand, liability risks are scarcely examined. In many cases insurance cover replaces the examination of questions of liability. Particular attention always applies to questions of liability which are linked with the object of the contract itself and with the conclusion of the contract. That regularly concerns questions in respect of liability for transport risks (transfer of risk), for delay in delivery, for defects and consequential damage and for defective products. Furthermore, the financial soundness of the contracting partner is examined. With respect to transport risks, the wide spread Incoterms (International Commercial Terms) fundamentally contribute to the reduction of misunderstandings and to the making easier of cross-border trade. Some enterprises explain that in the case of exports, legal examinations turn out to be more exact than in the case of imports. In addition it is attempted to combat the non-ascertainable, varied, incalculable liability risks by the means of liability limitation clauses. Here it is in particular examined, to what extent such limitation clauses are recognized and are implementable in cross-border business transactions. In this context it is stressed that the risk of legal action (and the enthusiasm for litigation), possible court case costs and the fairness of the jurisdiction in another country all play an important role. Associations and the bar repeatedly point out that smaller, less experienced enterprises very often lack any consciousness that cross-border business transactions involve particular risks. They are often dealt with as purely national business transactions. In many cases one imagines oneself, with a settled reference to one's own national law, to be certain of its applicability. With this, the differences between choice of law clauses and place of jurisdiction clauses are mostly not considered. Aside from this, it is not recognized that with the agreement on a national law, U.N. Sales Convention (CISG) becomes applicable if it has not been expressly excluded. For the remainder it is not recognized that property law regulations are subject to *lex rei sitae*. Banks refer to a considerable additional examination expenditure in relation to industry and trade in the case of cross-border financing. As a rule, a comprehensive legal opinion by specialists from the country concerned precedes the conclusion of a business transaction. Insurance likewise suffers from these difficulties. The ascertaining of hidden risks is particularly difficult and cost intensive here. As far as possible they operate with a choice of law and the agreement on exclusions of cover.

**672. Qn 3 (protection of confidential information)** Problems with the protection of confidential information are come across in certain areas. For instance, licence and

patent negotiations, joint-ventures, the purchase of enterprises and confidential drafts in the circulation of business, are referred to. For the protection of confidential information it is usual to begin with to come to a secrecy agreement or confidentiality agreement. Finally, it is jointly stressed that the main problem lies in the ability to prove breaches of confidentiality agreements, the causality for the damage arising from it and the determination of the amount of damage. Problems of this type also appear, however, in purely national business transactions.

**673. Qn 4 (incorrect information)** Question 4 (problems involving liability for incorrect financial information) was almost uniformly and industry-wide, answered in the negative. The answers implied that either no information on this was available or that no problems were known of in cross-border business transactions; only very seldom was question 4 answered positively, but without further explanations however. The financial services sector also made no statements and named no concrete problems.

**674. Qn 5 (choice of law)** All responses stress that with cross-border business transactions a choice of law is of decisive importance. In many cases it is emphasized that the free choice of law is of prime importance to the development of cross-border business activity. The free choice of law allows the parties to evade regulations which restrict the circulation of business, through the choice of a legal system which corresponds better to their interests. Insurers point out that they particularly suffered from limitations of the freedom of the choice of law. The more experienced an enterprise is, and the more influential the business or business relations, then the more complex and more cautious the agreement on the choice of law turns out to be. It is to be stressed, though, that nearly always every party tries to assert their own "home (internal) law". If this is not successful, in many cases it is attempted to agree on the home territory as the place of jurisdiction; finally the respective stronger contracting party wins. In general terms of business, stereotypically choice of law clauses are found in which the application of one's own national law is referred to. Likewise stereotypically, large enterprises expressly exclude the applicability of CISG. As reasons for this, the familiarity with one's own legal system and its reliability are given. Associations and representatives of the German bar point out that following the reform of the law of obligations, the CISG has become more attractive. In many cases in cross-border business transactions, a switch is made to the legal systems of third countries – often to Swiss law. This frequently occurs when the parties cannot agree on the application of the law of one or other of their own national legal systems and/or because choice of the law of a third party state better corresponds to the interests of the contracting parties as a whole. In certain cases one party will agree to the application of the law of the contracting partner's state with a view to judicial enforcement and execution because there is no international convention on enforcement of judgments and execution between the states concerned. That is particularly the case for transactions concluded with parties in eastern European states. Without exception it is felt as being problematic, that property law does not recognize the choice of law. The mortgage lenders therefore point out that with cross-border mortgage loans, in order to guarantee the ability to execute the lien on real property due to the loan, the law of the country in which the realty lies, is also regularly agreed upon.

**675. Qn 6 (non-excludable comparative competitive disadvantages)** In the statements which came from Germany, it is asserted without exception that the expansion of regulations caused by the national reform of the law of obligations prompted by the need to implement the EC Sale of Consumer Goods Directive, but also addressing business to business transactions is felt to be unnecessarily restrictive. Referred to in particular were the regulations §§ 444 and 639 BGB which according to their wording are mandatory whereby the guarantees as to qualities (in particular used in the field of capital equipment) permit no liability limitations. The extensive control by the courts of general terms of business outside of consumer transactions (§§ 307, 310 (1) BGB) is perceived as a disadvantage of location. Statements from other countries limit themselves mostly to hindrances from employment law, sales tax law and particular duties to pay fees in the financial services sector (for example, Austria). However, the general statement is repeatedly encountered across the EU, that the usual policy of the EC Directives in laying down for the member states only a minimum standard for consumer protection is unsatisfactory. This is because it allows member states to enact more extensive restrictive regulations for the protection of the consumer, and across the member states use has been made of this opportunity with varied intensity. That hinders a real approximation of the law and even occasionally generates distortions of competition; in countries with a particularly extensive consumer protection this can even result in discrimination against home industry.

**676. Qn 7 (adjustment of contract terms to differences in applicable contract and tort laws)** Regarding the differences between contractual and non-contractual liability, there appears to be as good as no consciousness of problems. In the cases where we actually received answers to this question, they stressed that a differentiation of the legal nature of the liability claim is scarcely considered. They are much more concerned with excluding liability risks as much as possible and/or at least limiting the amount.

**677. Qn 8 (action and costs in ascertaining private law of another member state)** As a first step independent legal research (books, internet) is often carried out, depending upon the importance and complexity of the business transaction. At the same time the respective appropriate associations are consulted. Furthermore, information is requested from the foreign trade organizations of the member states. For important business transactions, frequently either inter-regional chambers or foreign specialist lawyers are contacted and commissioned to supply a detailed legal opinion; the latter always proves to be very cost intensive. Large enterprises regularly have their own legal department at their disposal, but they also explain that the engaging of foreign specialists is often unavoidable. It occurs not seldomly, however, that in the business world the idea appears to prevail, that more exact legal research is dispensable as long as the wording of the contract is formulated exactly enough.

**678. Qn 9 (problems due to differences in rules on acquisition and ownership of movables)** All the answers, irrespective of trade or country, complained about the difficulties in relation to credit securities in the cross-border circulation of business transactions. The agreement of possessionless chattel mortgages counts as being standard in business circles. In many cases in national business transactions, chattel mortgages and

in particular reservation of title are regarded as cost-favourable and unbureaucratic means of security. Above all in Germany, reservation of title has at least established itself with its different forms of appearance in the national circulation of business transactions, in cross-border business transactions, however, its ability to be used is scarcely secure. That is connected to the *lex rei sitae* establishing of international property law, which can not be contracted away by way of a choice of law. To compound matters there is a lack of uniform legislation in this area and even of mutual recognition of national and international securities. The EC Late Payment in Commercial Transactions Directive has recognized the simple reservation of title as a Europe-wide means of security, but it does not go far enough. A standardisation of the rules on reservation of title was only partly achieved with the Directive. Its art. 4 puts reservation of title under proviso of the applicable national measures, furthermore its particular forms are not captured and the same is true for its effects in insolvency execution and individual compulsory execution. Registration duties and fees cause loss of time and considerable costs. Small and inexperienced enterprises often lack any consciousness of legal problems; their claims for the purchase price are therefore frequently no longer effectively secure following the crossing of a border by the goods.

**679. Qn 10 (different modes and costs in securing cross-border credit)** Question 10, which is linked to question 9, is explicitly answered in the positive. In cross-border business transactions, predominantly letters of credit are used which prove, however, to be cost intensive and only prove worthwhile in the case of “big” business transactions. For the remainder bank guarantees, letters of credit, government export credit guarantees and parent company guarantees are named. They also cost a lot of time and money. In many cases, due to this the price is simply demanded before delivery, if that is at all possible. With smaller business transactions risks are partly consciously run; transactions are concluded on the basis of trust. Banks refer to a considerable expenditure on legal investigation in the case of cross-border credit securities. The inquiry extends in particular to assessing whether a right of security in fact exists and the extent to which the secured claim can actually be enforced and what it may yield.

**680. Qn 11 (comparative costs of credit in countries where creditor not located)** Industry, commerce and trade appear to have little experience with this area of problems. It is uniformly noted, however, that the cost of credit within the EU is primarily orientated towards the credit rating of customers, the system of credit securities only playing a secondary role. Banks and insurers judge this similarly. It is stressed, however, that the awarding of credit is almost exclusively nationally concentrated and that cross-border financing is only very reservedly pursued due to the legal difficulties tied in with it and the additional, considerable costs involved in identifying them and in taking necessary steps to deal with them. Mortgage lenders refer to the fact that for them the enforceability of unregistered preferences on real property is at the fore. The reliability of credit securities, above all mortgages on real property, and the possibility of secure realization play a decisive roll. The mortgage lenders complain emphatically that the lack of the comparability of mortgages on real property within the EU represents a fundamental hindrance for a Common Market concerning mortgage financing.

**681. Qn 12 (unsuitability of domestic modes of security)** In general agreement the following were named: the reservation of title in all its forms, a chattle mortgage, and assignment of claims for security purposes.

**682. Qn 13 (restrictions of trade due to differences in reservation of title rules)** The question was not explicitly answered in the positive. Although it was explained in general agreement, that further-reaching legal alignment measures in the area of reservation of title and further credit securities are strongly wished for. It was sometimes proposed to introduce the principle of mutual recognition of security rights validly established in a member state.

**683. Qn 14 (costs in pursuing claims against contract parties in another member state)** This question was uniformly answered positively. Duplicated legal fees are a big problem, in particular when the trial has to be carried out in another country. Furthermore, considerable translation and travel costs exist. Aside from this it is regarded as unsatisfactory that no uniform rules exist to provide that the successful litigant is entitled to costs from the other party. It was often criticised and considered questionable that the successful party is sometimes awarded either no costs or less than full costs. Problems of notification and in some countries excessively long delays until a decision is rendered were complained about. It was uniformly noted that factors of this type have a likewise burdensome effect on cross-border business circulation in the EU.

**684. First questionnaire round: letters to consumer organisations** This letter had the following wording:

“The European Commission at the start of this year commissioned an international team of experts, lead and coordinated by us, to undertake a “Study on property law and non-contractual liability law as they relate to contract law” (SANCO/2002/B5/010). This study follows in the wake of the Commission’s Communication on the future of European contract law. One immediate question which has arisen – not least because of the conclusions of the European Council and a resolution of the European Parliament – is whether harmonization of private law is meaningful or adequate without incorporating important parts of non-contractual liability law and property law. Our study addresses this question and its conclusions will most likely play an important role as regards future EU legislation.

The European Commission has placed strong emphasis on obtaining information about current business practice and experience. One question in particular is whether and to what extent the existence of some sixteen (in the future: twenty-six) different legal regimes for contract law, property law and tort law hinders full exploitation of the economic possibilities of the internal market or distorts competition. We would therefore be very grateful if you could share your experiences with us and inform us about problems identifiable from a consumer perspective. Information received will of course be treated as anonymous, if so desired.

We are especially interested in obtaining answers to the following questions concerning difficulties for consumers in cross-border commerce within the European Union. We have deliberately drafted them on the basis that no special knowledge of European private law is required. In an appendix to this letter we explain in brief why these questions appear to us important. *We would like to stress that we do not expect anyone to answer all of these questions.* It would be quite sufficient if you could address those questions that seem to you to be relevant from a consumer perspective. Moreover, we would be grateful, of course, if you are also able to alert us to other problems of importance to you.

1. Do you know of situations in which consumers have abstained from business transactions because they were uncertain of their legal rights and how these might be enforced under a foreign legal system?
2. Is your organisation able to safeguard or improve the legal position of consumers in relation to foreign businesses (e. g. by providing information about foreign law or scrutinising standard terms and conditions)?
3. Can you cite cases in which consumers are particularly disadvantaged by taking up cross-border supplies of goods or services when compared with domestic transactions?
4. What problems arising in connection with electronic commerce are of particular relevance to consumers?
5. Has the internet led to a multiplication of legal difficulties from the standpoint of consumer rights? Is an increase in such problems in the future to be expected?
6. Are you aware of problems arising from misuse of personal data or other information confidential to the consumer? If so, how are you able to respond?
7. Are you aware of problems involving incorrect information and consequent claims to compensation, e. g. in the financial services sector?
8. Do agreements for a choice of law to the detriment of the consumer play any significant role?
9. Do you know of legal provisions which induce consumers to opt for suppliers based in another jurisdiction?
10. Do contracts (and especially general terms and conditions) take into account the fact that the liability of the supplier (quantum of damage, limitation of actions/prescription, burden of proof, liability for subcontractors, etc.) may be quite different depending on whether the applicable law is contractual or non-contractual?
11. What action is taken when it becomes necessary to ascertain what is the private law of another EU member state and what costs does this give rise to?
12. Does borrowing abroad cause special difficulty or additional costs? Are consumers forced to give security of an unfamiliar nature or in a manner which involves greater risk?
13. Are consumers who pay for goods abroad in advance confronted with particular problems if the goods are not delivered according to the contract?
14. Are special costs involved in pursuing legal claims against businesses based in another member state?"

**685. Summary of responses** The return of the catalogue of questions sent to consumer associations was in total extremely small, occasionally it was pointed out that for reasons of expense there was no longer a legal department and therefore they did not see themselves sufficiently in the position to answer the questions posed. From the *Verbraucherzentrale Bundesverband e. V.*, Berlin, came a comprehensive response to the catalogue of questions. This response was in turn based on enquiries made by the *Bundesverband* with the provincial offices and also with the European Consumer Centres within Germany.

**686. Qn 1 (consumers abstaining from transactions due to uncertainty as to rights or their enforcement)** Question 1 was positively answered with respect, above all, to insurance contracts, real property transactions and the purchase of cars. With respect to other transactions in day to day life, consumer associations are, on the other hand, mostly only consulted if difficulties have already arisen in connection with the termination of a contract. In this context an unsatisfactory experience in attempting to get legal redress in a foreign jurisdiction can very often result in the party avoiding such transactions in the future.

**687. Qn 2 (ability of organisation to assist consumers)** The consumer associations responded positively as regards this possibility. They pointed out that within the EU consumer law is very substantially regulated by Community law, usually in the form of directives, which at least guarantees for the consumer in various fields a minimum protection on an EU-wide basis and improves and facilitates consumers in furthering their interests in cross-border transactions. Reference was made in this context in particular to the Rome Convention and EC Regulation No. 44/2001/EC. Aside from this it is emphasized that the network of European Consumer Centres makes the obtaining of comprehensive national as well as Community law information in consumer affairs easier.

**688. Qn 3 (comparative disadvantage for consumers in cross-border supplies)** The associations explain that in the case of cross-border transactions, the enforcing of the law represents the main problem for the consumer. Often enterprises seem to evade their obligations due to the spatial distance to their contracting partner. This occurs especially with internet sales, telephone sales, catalogue sales and sales by correspondence. More frequent are cases in which goods ordered by consumers and mostly already paid for by credit card, are not delivered, are delayed in delivery or are delivered damaged. Especially the rescission of failed cross-border contracts entailing the return of money gives rise to considerable difficulties for consumers asserting their rights effectively. The British consumer organization refers to section 75 of the Consumer Credit Act 1974. Following this, credit providers (also credit card institutions), are joint debtors along with the supplier in an external relation, in respect of the third party. This has the advantageous consequence that, for example with internet transactions, if the consumer has not had the goods already paid for delivered to him, he can stop the credit card institution and demand the cancelling of the payment.

689. Qn 4 (problems connected to electronic commerce) The consumer associations receive numerous complaints about internet providers. The frequent cases in which the consumer has to pay in advance, but does not receive the ordered goods, or not in normal condition, are problematic. Likewise complained about are numerous cases of insufficient or defective product information, defective information about sending costs and improper clauses in general terms of business. The association's generally emphasize that the problems are more practical than legal.

690. Qn 5 (actual or anticipated internet-related problems) The consumer associations observe without exception an increase in the difficulties related to internet purchases. Here also, the main problem is named as being the disregarding of existing legal measures. Furthermore, it is mentioned that the consumer is enabled to purchase goods over the internet, which following the measures of his home country, for example, are not accessible to him without some form of restrictions. An important example is provided by purchases of medicine.

691. Qn 6 (misuse of personal data and other confidential information) The consumer associations report many misuses of personal data or other confidential consumer information in particular over the internet, very often in the area of time sharing. Personal data are, once put on the web, often forwarded. Credit card misuse is also referred to, which is made easier by accessing a credit card number entered only once by the consumer. Consumers can not rely on the confidential treatment of data given by them.

692. Qn 7 (incorrect information) Question 7 was only answered with the general reference that consumers often do not feel sufficiently informed and that lack of information often occurs with cross-border payments and financial investments.

693. Qn 8 (choice of law agreements to detriment of consumer) Question 8 is answered to the effect that choice of law agreements to the disadvantage of the consumer play a smaller role today than before. Although consumers are regularly unsure of themselves if foreign law is applied.

694. Qn 9 (legal provisions inducing consumers to opt for foreign suppliers) Above all purchases of medicine were named, in order to avoid national restrictions to access.

695. Qn 10 (adjustment of contract terms to differences in applicable contract and tort laws) This question was negatively answered in as much as it was responded to at all. The German *Verbraucherzentrale* in addition points out that the general terms of business of German enterprises partly no longer correspond to the new German law of obligations. In many cases this is even true in the law of limitation.

696. Qn 11 (actions and costs in ascertaining private law of another member state) The network of European Consumer Centres allows for comprehensive legal inquiries in consumer affairs. These services are free for consumers, because the network is financed by the EU. Aside from this, national consumer associations take up contact between one

another. Moreover, consumers are referred to chambers working in more than one region, or foreign lawyers.

**697. Qn 12 (difficulty, costs, familiarity and risks of borrowing and security abroad)** Cross-border borrowing appears very seldom. Consumers, as a rule, use their own local borrowing institution. Cross-border borrowing regularly fails due to bureaucratic formalities, the difficulties of examining individual cases and different effective interest rate calculations. Language difficulties also lead to a very restrained demand for cross-border borrowing.

**698. Qn 13 (problems of advance payment and non-delivery)** In connection with the responses to earlier questions, the particularly difficult situation with internet transactions was referred to. The rescission of failed cross-border contracts entailing the return of money represents a big problem. The support of consumers by the European Consumer Centres is of great importance.

**699. Qn 14 (costs in pursuing claims against businesses in another member state)** Art. 5 of the Rome Convention on the law applicable to contractual obligations is seen as an important building block of consumer protection law, whereby in the case of consumer contracts a choice of law cannot deprive the consumer of protection afforded to him by the mandatory provisions of the law of a state in which he normally resides. Similarly identified as a fundamental element of consumer protection is EC Regulation No. 44/2001/EC. It is to be taken into consideration, though, that the position of the consumer is much weaker, if he goes himself to make a purchase in another country. The consumer associations point out that in many cases, time and particular costs have to be invested in the investigation of the enterprise and in determining at what address a writ is required to be served. This is also the case with respect to having to translate documentation. As has already been mentioned, the European Consumer Centres through their network are an effective and free source of assistance to consumers seeking to assert their rights through legal action. If lawyers have to be engaged, however, the costs mount considerably.

**700. Second questionnaire round: letters to business and consumer organisations** The second questionnaire served the purpose of providing stakeholders the opportunity to respond to the particular issues identified in the study and conclusions provisionally drawn. As already stated, the information contained in the replies received has been integrated directly into the preceding parts of the study. Further information about this second questionnaire is set out in section 36. The text of the second questionnaire was identical for business associations and consumer organisations alike. It read as follows:

*“A. Introductory Remark*

We think that a large number of problems which we have encountered in our Study probably hamper the smooth functioning of the internal market, but we want to check whether they cause problems for you in practice. In doing so, we would like to ascertain:

- (i) whether you (or your members) have encountered the sort of problems we describe, and how it affected your business, specifically

- (ii) whether and, if so, a possible lack of information about foreign law or costs involved in obtaining such information, when needed, actually created obstacles to free circulation
- (iii) whether particular rules in the jurisdiction where you planned to engage in business deterred you from undertaking business activities there or whether those rules caused you additional costs (e. g. insurance premiums),
- (iv) if, for reasons of time or costs, you did not obtain information about foreign law, whether you experienced “unpleasant legal surprises” in the course of carrying out the contract as a result,
- (v) whether you know of risks for which it is not possible for you to obtain insurance and how you respond to such situations,
- (vi) whether drafting, negotiating or interpreting contracts governed by foreign law or to be used for business in a foreign jurisdiction lead to special difficulties and costs,
- (vii) whether efforts to obtain security for risks involved in business abroad make the price of your supply more expensive, and
- (viii) whether you suffer a competitive disadvantage in relation to competitors operating under another legal system as a result of different rules in contract law or non-contractual liability law?”

## B. Tort Law and Contract Law

### 1. Unitary and twin-track systems of liability

- a. Member States’ laws differ greatly as to whether questions of liability arising between parties to a contract are governed exclusively by contract law or whether instead *both* contractual liability *and* liability under the law of tort (or delict) are possible. There are likewise substantial differences regarding whether a particular issue of liability is a matter of contract law or the law of tort (delict). In *section 46* of our Study we suggest that these “overlaps” may cause particular information costs simply because in such areas it is almost never enough to limit the study of the foreign legal system to contract law or the law of tort (delict): knowledge of both parts of the foreign law is essential. Does this assumption about information costs reflect your own experiences?
- b. In *section 54* of the Study we consider the significance of non-contractual strict (or no-fault) liability within a contractual relationship in the context of cross-border passenger transportation. In our view the legal position appears to be extraordinarily complex. Bus companies, for example, are exposed to completely varied risks of liability in relation to their passengers depending on the applicable national law. Do these differences affect your business in practice? What impact, if any, do they have on costs and the extent of insurance cover? Have you experienced situations where a tough liability regime has put you at a competitive disadvantage because competitors can operate under less severe liability regimes? In terms of insurance cover and price setting, how do you address the problem that activities in another country may result in liabilities which are quite unusual according to the standards of your own national law?

### 2. Differences between contractual liability and liability in the law of tort (delict)

- a. An appreciable part of the Study examines differences between contractual liability and non-contractual liability in the legal systems of most of the EU Member States. In

section 94 we point out that as regards personal injury and property damage the quantum of liability may vary depending on whether liability arises exclusively under contract law or whether additionally liability in tort (delict) comes into play. In sections 131 and 138 we indicate that there are often also clear divergences as regards the conditions and extent of liability for non-economic loss. Section 148 discusses liability regimes which make use of a concept of exemplary or punitive damages, either in the law of tort (delict) or in both the law of tort (delict) and the law of contract. Do these legal differences restrict your ability to conduct your business so as to make full and effective use of the internal market? If so, how?

b. Section 279 deals with the special problem of limitation of actions (extinctive prescription of claims) where Member States have very diverse and often rather obscure legal positions resulting from the distinct rules on the limitation (prescription) of contractual and non-contractual claims. Has this had an adverse impact on your business?

### 3. Special privileges restricting liability

a. It appears to us that someone who enjoys special privileges under their national law against liability potentially has a competitive advantage. This is something we analyse in sections 69 and 70. Examples are to be found in the liability of self-employed professionals such as lawyers, engineers and architects (section 69) and doctors (section 70). Liability for malpractice in the exercise of such professions is clearly variable across the national laws. It ranges from (i) strict liability (independent of fault) and (ii) liability based on a rebuttable presumption of fault (iii) through liability dependent on the client or patient proving fault to (iv) liability only for intentional or grossly negligent malpractice. Is your ability to compete in the internal market hampered as a result of such differential rules on liability?

b. The legal differences in respect of liability for lost opportunities (“loss of chance”), discussed in section 113, could similarly have the effect of distorting competition. These too primarily affect self-employed professionals such as tax advisers, doctors and lawyers. They result in differential risks of incurring extensive liability. Have you had experience of these legal differences? Do you incur additional costs in having to take account of them?

c. As we explain in section 131, in some jurisdictions an employer is not generally liable for accidents at work caused by one of its employees, whereas in others civil liability has been preserved and in relation to non-economic loss can prove to be appreciably high (e. g. in Spain). Do these differences in the laws of the Member States hamper your participation in the internal market (e. g. because of the need to incur additional costs, such as insurance) or set you at a competitive disadvantage?

### 4. Exclusion of liability

Businesses wishing to make use of contractual clauses excluding liabilities when engaging in trade abroad, or which are confronted with such clauses, can frequently expect an examination of their legal position to be an arduous task (see section 242). Often it may well not be possible to ascertain the legal position in the particular circumstances of the case with any degree of certainty: the matter may turn on the application of a general clause the practical effect of which is only ascertainable after a comprehensive analysis of

case law. As a result the field of play for legal disputes may be wide open. A business which succeeds in imposing its own standard terms and conditions on its foreign business partner has the difficulty of adjusting these, where necessary, to take account of the foreign law – especially its law of tort (delict). If it does not do so, it may enjoy a false sense of security and suffer “unpleasant legal surprises” later. Well-informed exporters may have to adjust their price calculations to take account of the fact that it is not possible to exclude non-contractual liability in the jurisdiction to which the goods are being sent. The differences in the law relating to exclusion of liability would suggest that the conditions under which goods or services are supplied in Europe vary from country to country and that the internal market may be fragmented. Has this problem been of practical relevance to you? If so, how do you tackle it?

#### 5. *Risks due to third party claims*

- a. In *section 65* we address the problem that suppliers of goods or services may be liable to their buyers because the buyers are themselves liable to their customers. This risk of liability is indirectly dependent on the rules of the legal system where the goods or services are to be supplied. (In a decided French court case, for example, a defective electronic article surveillance (or “tag-and-alarm”) security system went off without reason so as to cast suspicion of theft on an innocent customer.) Under French law the supermarket concerned was strictly liable to the customer for the aspersion publicly cast on their character. By contrast a German or English supermarket chain would not have been liable to the customer and would therefore not have had cause to seek redress from the supplier of its security system. Have you experienced comparable cases where a right of recourse is exercised due to liabilities to third parties or a risk of recourse was present? If so, how did you tackle this problem? Can you identify whether the different risks of liability incurred by your purchasers vis-à-vis their customers have had an impact on your own business practices?
- b. In *section 84* the Study considers legal differences as regards contractual liability dependent on fault. Under French law, for example, a seller is strictly liable in damages for latent defects, whereas under German law the corresponding liability is dependent on fault. In your experience do such differences result in obstacles to effective exploitation of the internal market – for example, because they cause differential insurance costs? Have you encountered comparable situations? If so, what were the consequences?

#### 6. *Drafting and interpreting contracts*

- a. Our understanding is that contracts drafted in foreign languages frequently cause particular difficulties in interpretation (see *section 449*). Have you sustained additional costs because of these – for example, in obtaining legal advice? Have you encountered situations in which legal terms of art in use in a foreign language have resulted in particular difficulties in understanding or have disrupted the course of carrying out a cross-border contract?
- b. Similar problems may arise in the course of drafting contracts (see *section 456*). A case in point would be contractual agreements about obligations to pay damages in the event of breach of contract. The question arises as to the pros and cons of particularising general terms like “damages” because of their different meaning in the legal

systems of the contracting parties (e.g., as to whether non-economic losses are included). Have you considered it necessary to particularise general legal terms in your contracts and, if so, has this resulted in prolonging contractual negotiations and additional (e.g. legal) costs?

7. *Liability to persons other than the contractual partner*

- a. A business offering or supplying services in another member state must reckon with the possibility that liabilities towards third parties may arise. For example, if a business in member state A undertakes to design or construct a building in member state B, it will need to assess the full range of possible risks of liability in order to factor these into its calculation of potential costs. This will include the risk of liability to third parties because e.g. rights of neighbours are infringed or land is contaminated (*section 26*). In your experience, is trouble actually taken to ascertain such risks of liability? Does the estimation of such risks cause particular difficulties and/or costs? Do difficulties in estimating such risks deter you from offering your services abroad?
- b. A similar problem may affect businesses in the media industry (*section 26*). Familiarity with the non-contractual liability law of the country from which information originates or to which it is to be supplied may be critical; legal differences in comparison with a business' own national law may have an impact on whether a "story" should be purchased, printed and exported. The protection of rights of privacy, confidential information and personal reputation vary significantly from member state to state. Have such variations had an impact on your own business?
- c. Significant differences exist between the laws of the member states on the question – treated in *section 120* and following paragraphs – whether compensation is payable for the pain and suffering of relatives of injured persons. While some award substantial damages, the rest are more reserved and in some cases even entirely exclude compensation as a rule. For businesses exporting their goods or services into more 'claimant friendly' jurisdictions, how do you address these risks? Do they have an impact on the costs of your insurance cover?
- d. In *section 201* and following paragraphs we set out the very diverse legal positions in the national legal systems regarding a business' liability for damage caused by employees, sub-contractors or others engaged by the business in the course of carrying out a contract. An apparently significant difference is the very different treatment of non-contractual liability for sub-contractors. Were you aware of the differential treatment of responsibility for the acts or omissions of sub-contractors to be found in the laws of the member states? Does your usual liability insurance cover such risks or is it necessary for you to obtain additional cover for such risks when engaged in business with a foreign dimension? Do you experience a competitive disadvantage because of the differential treatment of responsibility for the shortcomings of sub-contractors, employees or others engaged on your behalf?
- e. *Section 322* relates to liability for interference in existing contractual relationships. Businesses which are anxious to establish themselves in a foreign market need to win new customers abroad and will often want to attract a local workforce. This may result in the severance of existing contractual ties between competitors and their customers or employees. The protection enjoyed by existing contractual relations varies from

- country to country. Does this differential treatment distort the market in which you compete or result in other obstacles to exploitation of the internal market?
- f. The rules on liability to persons who suffer damage only indirectly (e. g. the injured person's employer or other members of a partnership to which the injured person belongs), discussed in *section 331*, vary appreciably across the EU. The same is true of liability to other contractual partners of the party suffering damage (e. g. a customer of an electricity supply company whose electricity supply is temporarily cut off when the company's cable is damaged). Have you encountered such cases in your field of business? Is the risk of liability to persons to whom you cause damage indirectly in this way insurable?
- g. It is possible that differences in the law of tort (delict) adversely impact on the function and enforceability of distribution networks based on exclusive arrangements and in this way cause obstacles to the smooth running of the internal market (*section 654*). (E. g.: a manufacturer of proprietary goods in country A delivers goods to dealers in country B under an arrangement whereby the dealers may re-sell only to end consumers. If an importer does not comply with this restriction and sells the goods in breach of contract to another dealer, it will often depend on the rules of the applicable law of tort (delict) (which vary from country to country) whether a reimportation is possible.) Have you had experience of these legal differences? Do you incur additional costs in having to take account of them?

#### 8. *Ownership and liability*

As *section 25* of the Study illustrates, in some systems of tort (delict) law a non-contractual liability to third parties may arise directly from the acquisition of ownership of property (for example, under French law where a latently unsafe building is purchased at an auction and collapses shortly after the successful bid is accepted). The point is particularly noteworthy where acquisition of relevant property does not require formal documentation or registration of a transfer. Have you experienced risks of this type? Has it been possible to insure against them?

#### 9. *Complexity of the legal position*

At numerous points in the Study we indicate that when the law of contract and the law of tort (delict) converge on a problem the legal position is especially complicated and difficult to divine. These difficulties are aggravated by the fact that the rules on private international law, determining which nation's non-contractual liability law is applicable on the facts of the case, themselves vary from country to country (*section 462*). Does this complexity and the comparatively impenetrable nature of the legal position pose particular problems for you? Are additional costs incurred as a result? Is it in practice worthwhile to ascertain what the law is, or is a decision made to proceed with foreign business on the calculated assumption that all will turn out okay?

### C. *Property Law and Contract Law*

#### 1. *Transfer of Ownership in Movable Things*

##### a. *Transfer of ownership by virtue of contract or of delivery*

In all border-crossing contracts involving a transfer of ownership (especially upon sales or production of specific goods), the question of how and when ownership passes from

the seller/producer to the buyer/customer may become relevant. That is especially relevant when one of the parties becomes insolvent between the conclusion of the contract and delivery of the sold/produced asset. Under the law of some member states, ownership in specific goods passes already upon the conclusion of the contract, whereas under the law of other member states it passes only upon delivery (*sections 481-487*).

If you are the seller/producer, which of the two alternative solutions do you prefer (reservation of ownership is dealt with separately under II)? The same question to you if you act as the buyer. Do you provide by appropriate contract clauses for the one or the other solution? In border-crossing transactions, do you make inquiries as to the legal situation in your customer's country? Do you regard the divergence between the two legal models as an obstacle to your conduct of business with other member states?

*b. Passing of risk upon conclusion of contract or upon delivery*

The issue of passing of risk is in several respects related to the preceding issue with respect to the transfer of ownership: In several member states, risk is regarded as an incidence of ownership and therefore passes together with it. However, there are two major models for the transfer of ownership itself (*supra* no. 1). By contrast, in other member states risk passes upon delivery of the goods sold or produced to the buyer/customer (*sections 488-491*).

The same questions arise as under preceding no. 1 on the transfer of ownership.

*2. Rights of Proprietary Security in Movable*

*a. Transborder creation of security rights in movable assets*

In most member states, the contractual creation of a proprietary security interest requires that the underlying security agreement is valid. By contrast, in at least one major member state the opposite rule prevails, at least in general (*sections 518-520*). Do these legal differences lead to uncertainty as regards the creation of proprietary security rights in another Member State? Thus, do you encounter higher costs? Would you abstain from a cross-border contract due to legal uncertainty or increased costs for the creation of security?

*b. Transborder (security) assignment of claims*

The security assignment of claims, like the general assignment, is

- a) in some member states effective vis-à-vis third parties, even if the account debtor is not notified of the assignment;
- b) whereas in other member states a notification of the account debtor is necessary in order to achieve full effects as against third parties, especially in bankruptcy (cf. *section 517*).

Do these legal differences lead to uncertainty as regards the validity and full effect of cross-border assignments of claims? Thus, do you incur higher costs in order to ascertain whether you have to give notice to the account debtor? Would you abstain from the cross-border assignment of claims due to legal uncertainty or increased costs?

*c. Dependent and independent security rights*

“Classical” security rights depend for their existence, extent and conditions, at least at the time of enforcement, upon the existence, extent and conditions of the secured claim. By contrast, so-called quasi-security rights, especially those based upon the transfer of title (security transfer of ownership of tangible movables; security assignment of claims) are at least in some member states and to some degree independent of the existence, extent and conditions of the secured claim (*sections 521-523*).

Do these legal differences restrict your ability to conduct your business by making effective use of the internal market? Do you invest money in order to ascertain whether the secured claim exists, which extent it has and to which conditions it is subjected?

*d. Export of goods encumbered by a security to other member states*

According to a general, mostly unwritten rule of private international law, the validity and effect of security rights in tangible movables (in particular, a reservation of title in a sales contract; or another nonpossessory security right) is determined by the law of the country where the goods are located. If this rule is applied to intra-EU border-crossing exports, it means the following: A security right validly created in the exporter’s home country A may be invalidated if the encumbered goods are moved to member country B. Whether or not the security right survives in the importer’s country B depends upon the law of B: If this law is less liberal than the law of A, the security right will be lost (or, at best, be reduced to the lower status prevailing) in B. Only if the law of B is similar to (or even more liberal than) that of A, is there a good chance that the security will survive after crossing the border (*sections 524-526*). One may expect that the more liberal the security regime of the exporter’s country, the greater will be the risk of loss of the security upon importation to a member state with a strict regime – unless precautions are taken.

How do you deal with this problem?

- a) Are you as an exporter conscious of this problem?
- b) Do you as an exporter take specific measures to take into account those risks (e. g., by arranging to have your security right adapted to the local requirements of the country of importation?)
- c) Or do you charge higher prices on account of that particular risk or do you increase the interest rate on the outstanding purchase price to a higher rate than for domestic sales?
- d) Or do you refrain from exports to specific member countries (which?) in view of the risk of loss of security rights?
- e) Or do you take recourse to other means of securing your open claims (e. g., export credit insurance; or a personal security, such as a suretyship or guarantee or letter of credit)? Are those other means more expensive than the creation of a proprietary security right?
- f) Is it worthwhile to ascertain the law in the country of importation or do you proceed in the hope that your foreign customer will at any rate duly pay?”

**701. Note of thanks to the authors of the responses** We received responses to our questionnaires from the following organisations and persons. They have our sincere thanks for the extraordinary trouble which they have taken to assist us.

*I. Responses to the first questionnaire*

*1. Industry and commerce*

*a. Business associations*

(1). Industry and commerce

Bundesverband der deutschen Industrie (BDI), Sigrid Hintzen, Berlin

Danish Chamber of Commerce, Sven Petersen, LL.M, Copenhagen

Deutscher Industrie- und Handelskammertag (DIHK), Dr. Christian Groß, Berlin

Industrie und Handelskammer Köln

Verband Deutscher Maschinen- und Anlagenbau e. V., Frankfurt am Main, Christian

Steigenberger, V. Häuselschmid

Vereinigung der österreichischen Industrie, Wien

(2). Chambers of trade

Handwerkskammer Braunschweig

Handwerkskammer Cottbus

Handwerkskammer Düsseldorf

Handwerkskammer der Pfalz, Elke Wickerath

Handwerkskammer des Saarlandes

(3). Associations of banks, insurers and other financial service providers

Bundesverband deutscher Banken, Berlin

Deutscher Sparkassen- und Giroverband, Dr. Thomas Schürmann, Berlin

Gesamtverband der deutschen Versicherungswirtschaft (GDV), Dr. Knauth, Dr. Fricke, Berlin

Hellenic Bank Association, Prof. Christos V. Gortsos, Athens

The Swedish Export Credits Guarantee Board (EKN), Stockholm

Verband deutscher Hypothekenbanken (VDH), Dr. Otmar Stöcker, Andreas Luckow, Berlin

*b. Other business associations and representative bodies*

British Art Market Federation, Mr. Anthony Browne, London

Der österreichische Handelsdelegierte für Portugal, Dr. D. Fellner

„New-Elite“, International Trading Network, Max Morocotti, Milan

Nordiskt Speditörförbundet, Freddy Sandahl, Stockholm

Portuguese Trade and Tourism Office, Èlia Rodrigues, Brussels

Wirtschaftskammer Österreich, Dr. Hanspeter Hanreich, Wien

*c. Business enterprises*

(1). Industry

ABB AG, Dr. Andreas Kollmann, Mannheim

Bayer AG, Bayer Business Services, Rechtsabteilung, Dr. Sascha Werner, Leverkusen

Applied for anonymity

Giesecke & Devrient GmbH, Dr. Christoph Kummerer, München

Wilhelm Karmann GmbH, Dr. A. Schäfer, Leitung Recht, Osnabrück

Körber AG, Hamburg  
 Linde AG-Engineering, Fachbereich Recht und Versicherungen, Andreas Renner,  
 Höllriegelskreuth  
 Mannesmann Plastics Machinery GmbH, Dr. Auer, München  
 Pirelli S. p. a., Oscar Boschetti, Chief Legal Officer Industrial Business  
 Ramaplast SPA, Castelnuovo Sciva  
 Applied for anonymity  
 G. Siempelkamp GmbH & Co. KG, Werner Schulte, Leiter Zentralbereich Recht,  
 Krefeld

(2). Logistics  
 Nosta Gruppe, Osnabrück

(3). Financial services  
 Bausparkasse der österreichischen Sparkassen AG, Wien  
 GE Capital Bank GmbH, Dr. Angelika Trautmann, Wien  
 Porsche Bank AG, Dr. Ralph Leonhardt, Salzburg  
 Raiffeisen Leasing GmbH, Dr. Dorith Savarani-Drill, Wien

(4). Telecommunications and information technology  
 Alcatel Optical Networks Division, Lodovico Doria  
 Lufthansa Systems Group GmbH, Andreas Lein, Kelsterbach

## 2. Legal Practice

Cabinet Gide Loyrette, Philippe Nouel  
 Eimer/Heuschmid/Mehle, Dr. Christiane Bierekoven  
 Etzel & Burmester, Ursel Etzel, Hamburg  
 Deutscher Richterbund, Brigitte Kamphausen, Berlin  
 Haver & Mailänder, Dr. Schnelle, Brussels, Stuttgart  
 Karl H. Lincke, Rechtsanwalt & Abogado, Madrid  
 Lichtenstein/Körner & Partner, Dr. Körner, Stuttgart  
 Nolting/Münzer/Hönig/Seibt, Dr. Ulrich Münzer, Dresden  
 S. Pötter, Rechtsanwalt und Notar, Berlin  
 Rechtsanwaltskammer Karlsruhe, M. Wissmann  
 Dr. Schäuble & Partner, Dr. Schäuble, Leipzig  
 Schlutius, Dr. Sparr, Hamburg  
 Dr. Schwarz/von Saldern/Diekmann, Dieckmann, Hamburg  
 Studio Legale Arena, Avv. Raffaele Arena, Messina  
 VINGE KB, Advokatfirman, Elisabeth Fura-Sandström, Stockholm

## 3. Consumer associations

Allgemeiner Deutscher Automobil-Club (ADAC), Roswitha Mikulla-Liebert, München  
 Confederación de Consumidores y Usuarios, Madrid  
 Consumers' Association, Stephen Crampton, London  
 Consumers' Protection Center (KEPKA), Thessaloniki

European Consumer Centre (Konsument Europa), Fredrik Nordquist, Pär Wikingsson, Peggy Haase, Stockholm  
National Consumer Council (NCC), Frances Harrison, London  
Verbraucherzentrale Bundesverband, Helke Heidemann-Peuser, Referatsleiterin Wirtschaftsrecht, Berlin  
Verein für Konsumenteninformationen (VKI), Rechtsabteilung, Thomas Hirmke, Wien

*II. Responses to the second questionnaire*

*1. Business associations and representative bodies*

Association of Building Engineers, David Gibson, Northhampton  
Bundesverband der deutschen Industrie (BDI), Sigrid Hintzen, Berlin  
Gesamtverband der deutschen Versicherungswirtschaft (GDV), Berlin  
Mouvement des Entreprises de France (MEDEF), Joelle Simon, Paris  
Ring Deutscher Makler, Bundesverband e. V., Langemaack, Berlin  
The Newspaper Society, Santha Rasaiah, London  
Verband Deutscher Hypothekenbanken (VDH), Andreas Luckow, Berlin  
Verband Deutscher Maschinen- und Anlagenbau e. V., Frankfurt am Main  
Wirtschaftskammer Österreich, Wien

*2. Business enterprises and other bodies*

AOK-Bundesverband, Hans-Holger Bauer, Bonn  
Linde AG-Engineering, Fachbereich Recht und Versicherungen, Andreas Renner, Höllriegelskreuth  
Applied for anonymity

*3. Legal Practice*

Etzel & Burmester, Ursel Etzel, Hamburg  
Haver & Mailänder, Dr. Schnelle, Brussels, Stuttgart  
Lichtenstein/Körner & Partner, Dr. Körner, Stuttgart  
Studio Legale Arena, Avv. Raffaele Arena, Messina  
Mag. Alexander Wolf, Patientenanwalt, Vorarlberg

*4. Consumer associations*

Confederación de Consumidores y Usuarios (CECU), Madrid



## Part Five: Analysis and Recommendations

### I. Tort Law and Contract Law

**702. Impediments to the proper functioning of the internal market** The main question of the EC Commission, whether interference, systematic problems or even terminological and conceptual differences between contract and tort law represent for the member states impediments to the regular functioning of the internal market. In order to be able to answer this question it was necessary to go over the whole breadth of the almost endless problem constellation in the border line between contract and tort law. In doing this, an extraordinarily complicated and multi-faceted picture appeared. The interference between contract and tort law is so frequent that it is practically impossible to summarise it in a few sentences. The multifarious variety of national variations on this subject complicates hugely the difficulties already common in every individual system. It is precisely this circumstance which must be disconcerting from the point of view of the internal market. This is because the legal situation in its totality is not even entirely and precisely decipherable by highly specialised experts; in the market place, enterprises active there have hardly a chance of reliably informing themselves of appropriate costs and in an appropriate time-scale. Doing business under different laws therefore remains, as before, a leap into the unknown, even in the European Union.

**703. Interference** The mutual interdependence of parts of a legal system, imagined and conceptualised as a whole, belongs to the most difficult parts of private law; in the context of contract and tort law this complexity is at its most pronounced. The parties to a contract can usually not avoid this complexity simply by contracting out. This is particularly manifest, because the application of tort law cannot generally be avoided by contractual agreement. This is reflected also in private international law. The question of what contract and tort law “are” is, however, judged differently from legal system to legal system.

**704. The problem of interference must be considered from the standpoint of every legal system – even a future possible European one** The problem of the interaction of contract law on the one side and tort and property law on the other is many-fold. At the outset it is important to note that every legal system – including a European contract law or patrimonial law possibly in the course of development – must confront it. In that context it makes no difference whether the legal instrument giving it effect is a non-binding Recommendation or takes the form of a binding legal text. Any proposals for some concept of a European contract law must be clear on the question what is being understood as “contract law” and how does it interlock with neighbouring areas of the law. Only when this is held in view and conceptual clarity about demarcations, overlaps and mutual influence subsists will there also be any prospect of acceptance of the content

of the instrument in the Member States of the EU. An important focal point of this study is thus the manner in which the autonomous laws of the Member States cope with the problem of interference. The experiences amassed here must be considered in any further considerations towards a European contract law.

**705. The interference problem in a narrow sense: the problem of complexity** It is important to distinguish between the problem of interference in a narrow (“technical”) sense and a problem of interference in a broader (“economic”) sense. The problem of interference in the narrower sense strictly understood only arises within one and the same legal system. The contract of country A only stands in a relation of interdependence with the tort or property law of the same country A. There is in principle no reciprocal interaction between the contract law of country A and the tort or property law of country B. Exceptions may be regarded as possible only in rare cases – for example, where the property law of A regards a contract concluded under the law of B as sufficient to pass ownership to the goods being sold or where the tort law of A prevents interference by third parties in contracts concluded under the law of B. Fundamentally, however, the proposition remains that cross-border reciprocal interferences do not arise. Consequently, as a point of departure, the phenomenon of interference, understood in this narrow, technical sense, can only burden the internal market from the perspective of complexity. That complexity is, however, enormous. In no other areas of the law in a given legal system is the legal position as difficult to ascertain as it is in the zones where its component fields of law overlap. This difficulty may well be manifest in the pages of this study devoted to the subject. We emphasise it not least because of the conclusions of the Council in Tampere, set out above in section 2, stressing that “individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or *complexity of legal [...] systems* in the member states” (italics added).

**706. Obstacles to the internal market** In contrast, there is no clear and uniform answer to the question whether different characterisations of the same potential conflict (for example) in country A as belonging to contract law and in country B as belonging to tort law are capable of causing obstacles to the internal market. Differences in the actual outcome achieved are often a matter of happenstance as much as they are conditioned by basic decisions of legal policy. That is because different characterisations of one and the same legal issue lead to identical outcomes almost as often as they lead to different outcomes. The study has provided a series of examples for both situations. Aside from the complexity of the legal position in so many states, there is evidently no well-defined interrelation between the problem of interference in the narrow sense and the functioning of the internal market.

**707. Distortions of competition** Distortions to competition threaten to appear whenever the same goods and services can be offered under different conditions. Belonging to the factors which play a role in this, are time and costs. Costly legal advice, the cost of which for foreign transactions is often double that of what is normal for purely national transactions, also disturbs the factor of time within the sphere of offers. Smaller and medium enterprises often have a considerable competition disadvantage due to the deficit of information in comparison with large, experienced enterprises. Moreover,

belonging to the costs are the liability risks and the financial precautions applicable to them. These liability risks, on the other hand, have their basis almost as frequently in tort law as in contract law. Many partakers in the market do not know of this liability law two-tier nature whatsoever; they concentrate on covering their contractual responsibility and occasionally almost naively assume that they already have their liability risk in their control. The extraordinarily diverged rules of non-contractual liability law are typically not, or only to a very limited extent, contractable away. All those questioned complain, moreover, about the high cost of taking legal action abroad.

**708. Responses of consultees** Part of the results of this study is therefore the proposition that problems from the interaction of contract and tort law scarcely result from individual national legal systems (although such problems do exist here and there), but rather from the complexity of the sum of the questions talked about here. In the real world of entering into business transactions the question is simply disregarded either in not being taken seriously or in being pushed to one side. Indeed only individual branches of business (in particular the financial service providers) report that the incalculability of individual liability risks gives rise to them standing back from cross-border conclusions of contracts, but this does not allow the statement that the complicated legal situation does not also disturb the internal market. It appears much more that because of the lack of another choice, matters are left “to chance” in the hope that everything will work out for the best. Our general impression resulting from the questionnaires, in other words, is that only a fraction of those operating in the European market are aware of and really appreciate the problem of interference. From our enquiries it emerges that the specific problem of interaction between contract and tort law is ultimately only a segment of the much larger problem of legal uncertainty in cross-border transactions. Furthermore, the importance of private law for the success of a transaction for most of those responding is in any case considerably discounted. That holds for contract law no more or less than it does for tort law and for domestic transactions no differently than for cross-border ones. A not untypical statement from those engaged professionally in giving advice, for example, is that it is not unusual for clients to react testily and manifest reluctance when it is explained to them that besides a potential contractual liability a non-contractual liability falls to be considered. The temptation to close one’s eyes to such complication in respect of domestic business is accentuated when it comes to business abroad.

**709. Analysis of various legal rules** The taking stock of legal rules carried out by this study has first of all confirmed, that contract law and non-contractual liability law are very closely dovetailed in all member states of the European Union. The producing of goods, services and capital is organized in contract law, whilst tort law protects the outcome of this performance exchange. Contract and tort law necessitate from one another that the one can not exist without the other. Indeed tort law operates in principle in respect of everyone, whereas contract law on the other hand in principle only affords claims to the respective contracting partners. The borders between these two regimes become visibly blurred, however. That is because (i) today contract law also deals not only with the protection of the expectation of performance but also with the protection of the reliance interest, (ii) contract law has expanded so as to include the interests of third parties and to encroach on the sphere of contractual negotiations, (iii)

tort law has developed quasi-contractual obligations, (iv) tort law protects more and more against interventions by third parties into a contract between two parties. Modern contract law increasingly works *erga omnes*, modern tort law *inter partes*. Numerous crossing over points are the consequence.

**710. Differences between tort and contract law** These important shifts in function are not mirrored, on the other hand, by increased harmonisation of the areas of contract “close to torts” with the “close to contract” areas of tort law. Contractual and tortious liability for damage are differentiated now as before by numerous individual questions. This study, despite its scope has not been able to plumb all these individual questions, but nevertheless has analysed the ten most important on the basis of reports from countries: The question of the independence from fault of the liability for compensation, liability for economic and non-economic loss, liability for the loss of a chance, punitive damages, liability for pure economic loss, liability for employees, agreed exemption from liability, contributory negligence and limitation. The rules on the concurrence of actions are very important from this starting point, the rules being differentiated by many individual peculiarities and occasionally also in principle. Their main field of application is that of liability for property damage and injury to the bodily integrity of a contractual partner, or someone treated equally under contract law. The liability, oscillating between contractual and tortious, for the self-destruction of a product represents a particularly difficult problem concerning detail.

**711. Conceptual differences** Partakers in the market, as has been stated, are scarcely conscious of the conceptual differences between contractual and non-contractual liability. Legally, however, they play an important role. This study shed somewhat more light on individual areas, namely on fault in the sphere of contractual negotiations, on questions of consumer protection, on liability for defective products, on liability for defective services and on liability for defective information.

**712. The common frame of reference: recommendations** The results of this study lead us to the recommendation not to limit the work on a “Common Frame of Reference”, expected to start soon, solely to contract law. This Common Frame of Reference must work out, as its first step, a European concept of “contract law”. This will only be possible, however, if it consciously adopts a methodical approach to drawing the borderlines between contract and other areas of law, in particular tort law and property law. The future model of European private law can also not be obtained in this situation with a clean cut between contract law and tort law. Both of these areas will always react towards one another like two overlapping circles. At the same time it is to be considered that it will be extraordinarily difficult, and in our estimation impossible, to differentiate in a comprehensible way between tort law “close to contract” and tort law “not close to contract”, and for the common frame only to cover the former. Indeed individual areas of non-contractual liability law might finally be left as separate, subject to their own rules (e. g. road traffic accident law). Such an approach may be necessary if political considerations dictate it. However, it should not be adopted as the starting point. It is strongly advisable to include non-contractual liability law, in principle, in its whole breadth in the work towards a Common Frame of Reference.

**713. Contract law and law of obligations** Moreover, the experiences of the Commission on European Contract Law show that it is extraordinarily difficult to fashion any sort of substantively useable demarcation between the general part of contract law and the general part of the law of obligations. Why, for example, should the assignment of a contractual right follow different rules from the assignment of a right arising in delict? Why should different regimes be created for rights of contribution as between joint debtors according to whether their liability is based on a contractual or a non-contractual obligation to the creditor? Why should a requirement to take (reasonable) care be defined only for the law of contract? Why should each European legal system have to cope with different concepts of damage? The necessary terminological coherence which represents one of the aims of the Common Frame of Reference, is not to be achieved without widening the perspective to the whole of the law of obligations.

**714. The interference problem in a broader sense** One of the essential difficulties which the authors of this study faced is bound up with the fact that as understood by the European Commission the study touches not only the problem of interference in a narrow sense, outlined above, but also further questions. The Commission had a broader concept of interference in mind. While not aspiring to a comparative appraisal of all tort law systems of the European Union and an analysis of obstacles to the internal market possibly arising from their diversity, the Commission would nonetheless like to know whether different systems of tort law adversely affect export activity and the exploitation of the fundamental freedoms guaranteed by Community law. This second problem is methodologically more difficult to grasp than the first. The reason is that the problem of interference in a “wider” (or “economic”) sense in essence relates to the question whether the conclusion of contracts does not occur, or threatens to remain undone, or is only possible on unfavourable terms, because in the country to which goods or services are to be exported a different tort law applies from the one in the country of origin. Such a functionally-orientated question no longer has much to do with the problem of interference of contract *law* and tort law. Rather it relates to the disruptive effect of foreign tort law on business *practice*. An attempt to answer this question would, however, seem to necessitate a complete comparison of all systems of tort law. There is hardly a single cross-border activity resulting in problems of tort law which does not have any bearing on the conclusion of a contract. Even a tourist who has a traffic accident (for which different systems of compensation may apply) will as a rule have concluded a contract with a travel company or the provider of accommodation. Structurally matters are the same when one looks at the question whether different regimes for the personal liability of employees injuring third parties in the course of their employment adversely impacts on labour mobility or whether different regimes for the liability of doctors or hospitals have negative repercussions for the mobility of patients.

**715. Obstacles to the providers of goods or services** In view of this difficulty we have concentrated predominantly on the question whether the provider (not the recipient) of goods or services has to be prepared for legal burdens on its business activity due to tort or quasi-delictual rules of the country of import with which it is not acquainted in its home country and which could therefore impair or potentially impair the exploitation of the freedoms aspired to in the internal market. According to our estimation such obstacles

do indeed exist. In the shortness of time available to us, however, it was not possible to illuminate all nooks and crannies of the national systems of tort law. Moreover, we should point out that we received only a few responses to our second questionnaire. In a number of cases we were informed that the addressee had nothing to add to their response to the first questionnaire. Other questions remained completely unanswered or the response amounted to no more than an unsubstantiated affirmation or negation. (The latter was true of as many replies to our first set of questions.) Not infrequently we were informed by the umbrella organisations for particular branches of industry that the member organisations are predominantly only active in their home market and an (internal) survey of members' experiences showed "that few if any problems are being encountered". There were also countless misunderstandings – for example, we were instructed as to the legal position in the addressee's country or requested to set it out in a personalised letter. For that reason we were often left with no other option but to fall back on the statement, supported by considerations of plausibility, that a given legal position *probably* obstructs (or does not obstruct) the internal market.

**716. Summary of the interferences of greatest importance for the internal market** The most important conclusions from the tort law part of this study may be summarised as follows. (i) We consider it highly probable that the dichotomy of contract and tort law liability generates special information costs. Obtaining information about foreign law at any rate costs much time and money. This was confirmed in the empirical study practically without exception (albeit with varying emphasis: see further below at *para.* 720). Really precise details as to this expenditure of time and cost could only be unearthed by a separate study, devoted to that end, in which the fee regimes for lawyers, the court fees regulations, the length of legal proceedings in disputes with a foreign connection and current practice in international arbitration tribunals, provision of advice and billing would have to be ascertained and evaluated. However, so far as both contractual and tortious liabilities fall to be contemplated in the solution of a legal problem, the increase in costs seems evident to us because the effort required in providing advice is necessarily doubled: instead of just one legal field, advisors must look into two. That said, larger businesses as a rule have a smaller problem in obtaining information than do medium size or small businesses.

717. (ii) A related point is that all businesses or business associations which responded to our questionnaire repeatedly stressed that all effort is centred on agreeing the application of one's own law. (Some shift is, however, evident from the responses received: German businesses have identified advantages in explicitly choosing the application of CISG; more generally, some have perceived greater advantage in choosing the application of Swiss law.) We deduce from this that there is a general anxiety that disadvantages from lack of awareness of the law and the legal uncertainty that results from it would have to be reckoned with if a transaction was subject to or came into contact with foreign law. A feeling of certainty prevails only under one's own law (and before the courts of one's own country). It follows in turn from this that the negotiating party which is economically weaker and therefore not in a position to insist on the application of its own law will as a rule also have forced onto it a weakened potential to enforce its rights. At the same time it is overlooked surprisingly often that tortious liability under the

regime of the country of import cannot be altered by mutual agreement in advance. The responses to our questionnaire show clearly that this circumstance is not well known. The assumption of many participants in the market that they have achieved their desired aim merely by a choice of law is only exceptionally well-founded (and even then only indirectly), namely where the private international law of the court having jurisdiction over the matter recognises a connection to tort law as accessory to the contract.

718. (iii) The concern that legal disadvantages might arise from the application of foreign law which is manifest in the efforts made to insist on a choice of one's own law was admittedly only rarely supported with concrete examples. As regards the actual subject matter under scrutiny in this study, practically the only ones which can be mentioned are anxieties about all forms of punitive damages (which, however, are alluded to only in conjunction with law in the USA and therefore appear not to be regarded as possible within Europe) and the concerns in particular of one national press association regarding foreign law protecting rights of personality. Regard should only be had to the country of origin, it is maintained, and that in turn signifies that the application of one's own law is the uppermost aim. It is conspicuous that the notion that foreign law could become a problem is more readily assumed with an eye to the acceding Member States than it is in regard to Western European states. However, that too is not particularised. Incidentally there appear to be particular reservations in some countries as regards the legal system of another particular country. For example, on the German side we have learned remarkably often (in the responses to both our questionnaires) that there are reservations with regard to the French law of obligations. The application of French law is excluded as much as possible. Where that could not be managed, (unspecified) "contingency provisions" are made.

719. (iv) We cannot exclude the possibility that some responses were affected by an endeavour to exert political influence on this study. That is conceivable, for example, when (without our having requested an opinion) we were informed that the respondent was opposed to any form of approximation or harmonisation of the law of obligations and we were subsequently assured that there were no or quantifiably few problems for the internal market. Agreements on choice of law and insurance cover solve everything, we were told, and engaging foreign lawyers and thus obtaining legal information is unproblematic. Identifying different standards of safety and liability worldwide is in any case customary. Others informed us that it cannot be disputed that the rules in the fields of law examined by us differ from country to country, so that a comparative study in this field is of real interest and contributes to better understanding of the diverse systems. It is «*certes plus contraignant pour les professionnels d'appliquer un droit autre que celui de leur pays d'établissement*». Nonetheless, foreign law is not necessarily more detrimental than domestic law, we were told, and so it was argued one cannot therefore say that it generally establishes an obstacle for the internal market. Consequently one was opposed to the European Commission's Action Plan, as they had already been informed. The responses to some questions tended in the opposite direction. One Austrian respondent, for example maintained that liability to third parties for pure economic loss ought under no circumstances to be extended; such liability is serious, but uninsurable. Some respondents, especially from German business, considered, however, that the matter was

not relevant to them. Occasionally it was insisted that one ought to proceed with the unification of international tort law – something which other branches of industry (e. g. associations of media organisations) only regarded as worth considering if it would mean a connection to one's own law.

720. (v) All of those responding on the issue pointed to the extraordinary complexity of private international law and indicated that it causes substantial information costs. Its diversity makes it repeatedly necessary to engage a foreign communicating lawyer – something which is only financially worthwhile for major transactions. This consistency in the responses and the fact that this of all questions elicited so many responses seems to us to be worthy of note because, as every informed person knows, obtaining information about foreign private international law is many times simpler than obtaining information about foreign substantive private law. Private international law consists of a manageably small number of rules which are easily accessible and which are in any case similar in their basic structures. If, however the expenditure of time and money for the assessment of the conflicts of law position is regarded as “enormous”, one may well conclude that the true magnitude of the complexity of the legal questions addressed in this study was practically not communicable. The subject of the Study was ultimately the border area of just two (sometimes three) parts of foreign *substantive* law. Furthermore, the non-expert runs the risk of confusing conflicts of law and substantive law. Only the insurance industry has homed in quite precisely on this difference. It was from this sector that we received the pressing recommendation that one should press ahead with approximation of conflicts of law, on which much hope is placed.

721. (vi) For businesses operating in the market many of the legal issues addressed in this study are unfamiliar; nor are they questions which it is worth those businesses examining more closely in the context of concluding a contract. Business activity appears as a whole not to take much regard of complications which arise from the (contract or) tort law system of the relevant country of import or from the interaction of the tort law of that country with contract law. As a result some of our questions remained completely unanswered. Some received nothing more than an unsubstantiated yes or no, others (to our astonishment) were dismissed as largely unimportant to market activity (e.g the complicated problem of prescription/limitation of actions or liability privileges for particular professions), and yet others quite simply met with incomprehension. Not infrequently among those was the different legal positions in the law of limitation of liability depending on whether contractual or extra-contractual liability is at issue. In other words, we did not receive more precise responses from industry and commerce on a subject as important as exemption from liability. From one Member State, for example, we were merely informed that the question is especially relevant in relation to “case law systems” and “IT services”. One must therefore improve, it was said, “enforcement, service of process and remedies”. It is noteworthy, on the other hand, that liability insurers regard this point as being of the greatest importance for their business and added that the problem of exemption from liability makes it necessary to undertake intensive and costly research into foreign legal systems. It would seem to emerge generally that questions of liability in the business economy are understood to be a matter for insurers, to which the corresponding risk is shifted. As regards the costs of this shift, no figures were brought to light.

722. (vii) Exceptionally we were informed, in an unspecific way, that risks of liability are or would be covered by insurance. Insurance passes for the solution to virtually every problem of liability. However, the cost of insurance was not specified in more detail. Occasionally it was reported that such costs “disappeared” into the general overheads of the business. A connection between insurance costs and the determination of prices was often denied and in one case even dismissed as “pure theory”. We did, however, receive one response to the exact opposite. In one response it was pointed out in this connection that (apparently) in export transactions at any rate only lower prices would obtain; in another response, it was stated that product liability incurred by members of the relevant association is covered by a global insurance so that no further concerns need be had. (This of course contradicts in part the responses to the first questionnaire which expressed misgivings in the area of liability for defective products). Others stated that they coped with uninsurable risks, such as risks arising from guarantees, with the aid of reserves. We have therefore met with little or no understanding in those places where we point out that the requirements (including fault or strict liability) and the extent of liability arising from contract or tort may be quite different for both economic and non-economic loss (including liability for loss of a chance) – which in turn may have substantial legal consequences.

723. (viii) In part responses proceeded from unfounded assumptions of law – for example, that contractual and non-contractual limitation can be agreed uniformly by contract, or that the problem of re-imports addressed by us is already solved by the ECJ, or that it suffices as a rule of thumb to take as a point of origin the law of one country (in this case Germany) because the others would only deviate from that at the margins. The compulsory nature of the (partially unified) product liability rules in Europe were perceived to have resulted in an increase in costs and competitive disadvantages in relation to countries outside the EU. Other responses made submissions about legal policy – for example, shortening prescription/limitation periods for extra-contractual claims to the related contractual ones. Some saw advantage in the preparation of prescription/limitation tables. Others informed us that certain services (in this case, the construction of buildings) could not be undertaken abroad without engaging local experts. Some phenomena seem to have so surprised our addressees that they were not taken up at all in their considerations. Examples are the continued existence of liability of employers for employees’ accidents under private law or the legal rules on punitive damages which were associated exclusively with the law of the USA. It is also conspicuous that in responses to the first questionnaire in particular we received many references to obstacles in public law. Those observations had nothing to do with the subject of this study and the same holds for the references to a few contract law rules which were perceived to be especially obstructive; these were problems experienced by German suppliers encountering French law.

724. (ix) The European systems of tort law exhibit great differences in the field of strict liability. We can neither confirm nor deny that these differences influence or affect decisions about location (e. g. in industries with particular environmental sensitivities). In keeping with the limited subject matter of this study we have not made enquiries about this. However, it is certain, for example, that transport companies – and in

particular passenger carriers – are exposed to different risks of liability depending on the place of accident. This relates not only to the ground of liability, but also to the extent of liability. Both liability to passengers as well as liability to third parties is regulated differently. We consider it probable that these risks of liability have an impact on the costs of participating businesses. However, although organisations in this branch were addressed, we did not receive any (usable) responses to our questions on this point.

725. (x) Clear differences exist in particular in liability for non-economic loss – both when the individual legal systems are compared amongst themselves and when contractual liability is compared with extra-contractual liability. Admittedly only businesses which supply to end consumers are affected by this problem. For business to business transactions it is maintained that the problem is irrelevant. No respondent went into any detail on the risk of recourse arising in this context.

726. (xi) The problem of the language of contracts and the terminological uncertainties bound up with it was ranked as very serious by the business representatives responding to our questionnaires. To no other question did we receive as many responses as we did to this one and all responses had the same tenor: substantial legal uncertainty is associated with the deployment of terms of art in a foreign language. The costs of legal advice are especially high here and the same is true for technical translations which can only be undertaken by highly qualified and accordingly expensive service providers. That coincides with all the other replies which we received on the subject of complexity/information costs.

727. (xii) As regards rights of recourse, whose starting points vary from country to country, we were essentially only informed that “the problem is familiar here”. Further details could not be gleaned beyond the fact endeavours are made to manage the problem by agreeing on CISG. Others informed us that the problem did not concern them; it only arose in transactions with end consumers and those were within its purview. Product liability risks of recourse would be covered by insurance, so far as they could. A problem referred to in one response to this issue pointed out that in the area of health insurance it is unclear to what extent a claim could be enforced against foreign providers of medical services (or relevant fourth parties) when an insured party receives medical care within the framework of his or her health insurance abroad, which, following payment by the insurer, it transpires is inadequate, necessitating further medical care in the patient’s home country for which the insurer is also liable.

728. (xiii) The different rules for liability for interference with existing contractual relationships were not commented on in detail, save for a general pointer to “the” law prohibiting unfair competition. The same is correspondingly true of the highly complex legal position concerning breaches of duty during the phase of contractual negotiations. We were informed that problems from disseminating information which is obtained at this stage would either be governed by contract or else would not occur.

729. (xiv) We were surprised throughout how much the possibilities of party autonomy in structuring contracts were overestimated in their effects as regards extra-contractual

liability law. With all respect we have to say that legal knowledge in this field is not widely dispersed. We deduce from this that in initiating cross-border transactions parties often trust in everything going well.

## II. Property Law and Contract Law

**730. The relevant issue** The central issue raised by the European Commission and to be resolved by the present study is whether there are practical as well as conceptual and terminological differences between the systems of contract law and property law in the legal systems of the member states which may pose obstacles to the smooth operation in practice of the internal market. For the field of comparative property law which is much less developed as, *e. g.*, comparative contract and tort law, the inquiry in this study was limited to three areas which appear to be of primary relevance for border-crossing trade and investment of capital within the internal market, *i. e.*, the transfer of ownership in movable assets as well as the constitution and general effect of contractual security rights in movable and in immovable property. The key issue is whether a unification or harmonization of contract law may exert an impact upon and interfere with the aforementioned key institutions of property law. Such impact may primarily be expected upon the contractual (as distinct from the statutory or judicial) transfer of ownership and creation of security rights in movables or in immovables. These aspects of property law have therefore been chosen as topics of analysis.

**731. Mutual interferences of contract law and property law** The single most disturbing institution of contract law with a broad, though varying impact upon property law is the French-Italian phenomenon of the “contract with a proprietary effect” which may either effect the transfer or the constitution of a proprietary right, whether ownership of, or a security right in, movables or immovables. The French system as such is distinctly presented in Part Three division II (*L’opposabilité des contrats aux tiers et par les tiers*). In a broader comparative perspective it is presented in Part Two divisions I-IV as the “unitary approach” of contract and property. This unitary approach of French law and related legal systems to the passing of ownership in specific goods stands in stark contrast to the “split approach” of most other legal systems that distinguish – although to different degrees – between the contractual basis and the proprietary effects of a transfer of ownership and the creation of security in movable or immovable assets. Interestingly, the impact of the contract upon transfer of ownership in specific goods is then for its part prolonged into and reflected upon a typically contractual issue, *i. e.*, the passing of risk to the buyer of a movable which is conceived of as a consequence of the transfer of ownership.

**732. Remedying interferences of contract law with property law** If and insofar as interferences of contract law with property law are undesirable from the point of view of property law, it is for the latter to remove them. That has already been done in all those legal systems that follow the “divided approach”. These legal systems reduce any undesirable impact of contract law upon property law by establishing separate, independent criteria for the creation or transfer of proprietary rights; these may vary from one member state to

another, depending upon the degree of dependence (accessory) which each member state regards as desirable for the contractual transfer of ownership and the creation and enforcement of contractual security rights in movables and in immovables. The reactions of stakeholders show, however, that for the transfer of ownership the division between the unified and the split approach is not regarded as a practical obstacle to intra-EU border-crossing trade.

**733. Other obstacles to a free flow of commerce in the internal market** The broad variety of contractual and/or proprietary requirements for giving effect to proprietary security rights in movable and immovable property is independent of the potential impact of contract law upon property law and has therefore not been fully developed in the present study. However, its disastrous effect in practice has been illustrated in the context of the intra-European transborder movement of encumbered movable assets. If assets validly encumbered in member state A are exported or otherwise transported to member state B, the originally valid security right runs a high risk of being extinguished under the law of member state B, if the latter's requirements differ from those of A. This result occurs frequently in practice and affects primarily the unwary, *i. e.*, especially small and medium enterprises. The reactions of the affected enterprises vary: those who are unwary may lose their collateral and thus the security for the credit they have extended. They may then waive further participation in the internal market. Others look out for different kinds of security, such as guarantees, credit insurance, also letters of credit; these are usually more expensive than proprietary security, especially a reservation of title. Still others may give up any attempt at achieving security and may sell upon an unsecured basis, the higher risk perhaps reflected in a higher price; this, however, is a competitive disadvantage in the foreign market. And still others give up specific business opportunities or limit their activities consciously to the domestic market.

**734. Possible remedies: private international law** Conflict laws or private international law is a primary candidate to look for a remedy since its function is precisely to overcome the existing divergencies between legal systems without affecting them in substance. The primary remedy is to unify diverging conflict rules. However, that remedy is not applicable here since the relevant conflicts rule is already uniform, by tradition and often unwritten: the *lex rei sitae*, *i. e.*, the law of the place of location of an asset applies. This rule, however, does not assist in the situation described in the preceding paragraph; to the contrary, application of this rule produces the result alluded to: while located in member state A, a valid security right is created there; this, however, may no longer be valid under the law of B after the encumbered assets have been moved into B. For this reason the uniform conflicts rule recently introduced by Directive 2000/35 against delayed payments article 4 par. 1 demanding the recognition of retentions of title validly created in another member state will have no visible effect, unless it is given a broad interpretation.

**735. Continued: a grace period** One remedy that is sometimes used by legislators is to introduce a grace period of three or four months. During this period the security right retains the validity and the effects which it had under the law of its preceding location in member state A. The creditor (or the debtor) has an opportunity to comply with the

differing requirements of the country of the new location in member state B. This chance for preserving the effects of the security right by complying with the special requirements of member state B (special form requirements, registration, etc.) is of course to the disadvantage of the merchants in member state B because the applicable regime is foreign deviating from the domestic regime of B. For this reason, the grace period must be limited in time and perhaps even in its effects. Nevertheless, the introduction of a grace period as a general rule would be a small step but may assist in many instances of border-crossing trade in movables in the internal market.

**736. Harmonization of security laws in steps** In the long run, the present divergencies of security regimes are not compatible with a fully effective internal market which demands removal of all artificial barriers to competition. A level playing field must be prepared, not only for border-crossing movements of collateral but also for obtaining valid security for credits extended to enterprises and residents in another member state to be secured by assets located there. A level playing field also is necessary for domestic situations since the present marked differences have an impact upon the availability and the cost of credits to debtors. Taking up this distinction, the first step should be to introduce a uniform regime for border-crossing trade. It may be optional but would have to cover especially the effects vis-à-vis third parties, i. e. the execution and insolvency creditors of both the debtor/grantor and the creditor/grantee of the security. – In a second phase, and in the light of the experiences with the uniform regime for cross-border security rights, the general introduction of a unified or harmonized regime of security, especially non-possessory security may be envisaged.



## Annexes Table of Abbreviations

AA	Ars Aequi Juridisch Studentenblad (Zwolle [later Nijmegen], 1. 1951/1952 ff., cited by year and page)
ABGB	Allgemeines Bürgerliches Gesetzbuch, 1 June 1811 (JGS946) (Civil Code, Austria)
A.C.	The Law Reports (Appeal Cases, House of Lords; London 1. 1875/76 ff.; the older part of the collection up to 1890 cited as Appeal Cases; from 1891 the abbreviation A.C. is used; cited by year, book, and page)
AcP	Archiv für die civilistische Praxis (Tübingen, 1. 1818-50. 1867; N.F. 1=51. 1868-49=99. 1906; 100. 1906-120. 1922; N.F. [=3.F.] 1.=121. 1923-29.=149. 1944; 30=150. 1948/49-53=173. 1973; 174. 1974 ff.; incorporating Archiv für bürgerliches Recht; cited by volume, year and page)
ALJR	Australian Law Journal Reports (Sydney, 1958-, cited by vol. and page)
All ER	The All England Law Reports (London, 1. 1936 ff.; cited by year, book, and page)
AMG	Arzneimittelgesetz. Gesetz zur Neuordnung des Arzneimittelrechts v. 24.08.1976 (Act on Medication Reform, 24 Aug. 1976; BGBl. 1976 I p. 2995, Germany)
AP	Audiencia Provincial (Court of Appeal, Spain)
A.P.	Areios Pagos (Supreme Court in Civil Matters, Greece)
App.	Corte d'Appello (Court of Appeal, Italy)
APR	Annual percentage of rate
Arm.	Armenopoulos miniaia nomiki epitheorisis (Thessalonika 1. 1946/47 ff.; cited by year and page)
Art(s).	Article(s)
ASA	Advertising Standards Authority
AtomG	Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren (Atomgesetz), 31. Oct. 1976 (BGBl. I S. 3035) (Germany)
BAG	Bundesarbeitsgericht (Federal Labour Court) (Germany)
BBTC	Banca, Borsa e Titoli di credito (Milano, 1934-, cited by year, vol. and page)
B.C.L.C.	Butterworths Company Law Cases (London, 1. 1983 ff.; cited by year, book, and page)
BGB	Bürgerliches Gesetzbuch, 18 Aug. 1896 (RGBl. p. 195) (Civil Code, Germany)

- BGBL Bundesgesetzblatt (Official Gazette, Germany) 1950;  
then in parts: BGBL. part I (1951 ff.) BGBL. part II (1951 ff.)  
BGBL. part III = Sammlung des Bundesrechts  
(Collection of Federal Statutes; Cologne, Bonn 1. 1958 ff.)
- BGH Bundesgerichtshof (Federal Supreme Court, Germany –  
before 1990 only for West Germany)
- BGHZ Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in  
Zivilsachen (decisions of the German Supreme Court in  
civil matters) (Cologne, Berlin 1. 1951 ff.; cited by volume and page)
- B.J.I.B. & F.L. Butterworths Journal of International Banking and Financial Law  
(London, 1986-, cited by year and page)
- BOE Boletín Oficial del Estado (Official Gazette, Spain)  
(Madrid 1. 1936 ff.; cited by year, number, and date)
- BolMinJus Boletim do Ministério da Justiça (Bulletin of the Ministry of Justice)  
(Lisbon 1. 1940/41 ff.; cited by volume, year, and page)
- B.S. Belgisch Staatsblad; see Monit. belge
- BT-Drucks. Bundestagsdrucksachen. Verhandlungen des Bundestages  
(Proceedings of the 1<sup>st</sup> Chamber of the German Federal Parliament;  
Bonn 1949 ff.; cited by volume, year, and if necessary by page)
- Build LR Building Law Reports (London, 1976-1998, cited by vol. and page)
- Bull. civ. Bulletin des arrêts de la Cour de Cassation rendus en matière civile  
(Bulletin of the decisions of the Court of Cassation in civil matters,  
France) (Paris 12. 1804/05, 128. 1926 ff.; cited by year,  
book, and number)
- BVerfG Bundesverfassungsgericht (Federal Constitutional Court, Germany)
- BVerfGE Amtliche Sammlung der Entscheidungen des  
Bundesverfassungsgerichts (Decisions of the Federal Constitutional  
Court) (Tübingen 1952 ff.; cited by volume and page)
- BW Nieuw Burgerlijk Wetboek, 1 Jan. 1992 (Boek 1, 1 Jan. 1970:  
Stb. 1969, no. 167 in conjunction with KB, 4 June 1969 Stb. 1969  
no. 259) (Boek 2, 26 July 1976: Stb. 1976 no. 228 in conjunction  
with KB, 12 June 1976, Stb. 1976 no. 342) (Boek 3, 4, 5, 6, 7, 7A,  
1 Jan. 1992: Stb. 1989 no. 61 b in conjunction with KB 20 Feb. 1990,  
Stb. 1990 no. 90) (Boek 8, 1 April 1991: Stb. 1991 no. 126)  
(New Civil Code, Netherlands)
- BW (old) Burgerlijk Wetboek, 1 Sep. 1838 (Stb. 1831 nos. 1 and 6 in  
conjunction with KB, 10 Apr. 1838, Stb. 1838 no. 12)  
(Civil Code, Netherlands)
- CA Court of Appeal (England); Cour d'Appel (France)
- Cal. 3d California Reports, Third Series (San Francisco, 1974-,  
cited by vol., year and page)
- CAP British Codes of Advertising and Sales Promotion
- Cass. Hof van Cassatie/Cour de Cassation (France, Belgium);  
Corte Suprema di Cassazione (Italy, when none other specified:  
sezione civile) (Court of Cassation)

Cass. ass. plén.	Cour de Cassation, Assemblée plénière (France)
Cass. ch. mixte	Cour de Cassation, Chambre mixte (France)
Cass. civ.	Cour de Cassation, Chambre civile (France)
Cass. com.	Cour de Cassation, Chambre commerciale et financière (France)
Cass. lux.	Cour de Cassation (Luxemburg); Court of cassation, Luxemburg
Cass. pen.	Cour de Cassation, Chambre pénale (France); Court of cassation, penal devision (France)
Cass. req.	Cour de Cassation, Chambre des requêtes (abolished) (France)
Cass. sez. lav.	Corte di Cassazione, sezione lavoro (Italy)
Cass. sez. un.	Corte di Cassazione, sezione unite (Italy)
CBR Jaarboek	Centrum voor Beroepsvervolmaking in de Rechten. Universiteit Antwerpen. Jaarboek (Antwerpen und Apeldoorn 1. 1996/97 ff.; cited by year and page)
CC	Code Civil (Civil Code, France), 21 Mar. 1804; Code Civil (Civil Code, Belgium, Luxembourg) 5 Mar. 1803 (15 Mar. 1803); Codice Civile (Civil Code, Italy) (Gaz.Uff., 4 Apr. 1942, no. 79 and 79 bis; edizione straordinaria); Código Civil (Civil Code, Spain) 24 July 1889 (Gaceta de Madrid no. 206, 25 July 1889); Código Civil (Civil Code, Portugal), (Decreto-Lei no. 47-344 25 Nov. 1966)
CCLT	Canadian Cases on the Law of Torts (Toronto, 1976-, cited by vol. and page)
C.com.	Código comercial (Commercial Code, Portugal), 28 June 1888 (Diário do Governo no. 203, 6 Sep. 1888); Código de comercio (Commercial Code, Spain) 22 Aug. 1885 (Gaceta de Madrid no. 289-328, 16 Oct. – 24 Nov. 1885); Code de commerce (Commercial Code, France )1808; Wetboek van Koophandel (Commercial Code, Belgium), 10 Sep. 1807
C.E.	Constitución Española (Constitution, Spain) 27 Dec. 1987, altered, 27 Aug. 1992 (BOE no. 311.1., 29 Dec. 1978)
CEE	Comunità economica europea
cf.	confer
CFI	Court of First Instance, general jurisdiction (Greece)
Ch.	The Law Reports. Chancery (London 1. 1891 ff.; cited by year, volume and page)
CICR	Comitato interministeriale per il credito e il consumo (the Interministerial Committee for Credit and Savings, referred also as the Credit Committee)
Cir.	Circuit
CISG	Vienna UN-Convention on the International Sale of Goods of 11. April 1980 ( <a href="http://www.uncitral.org/en-index.htm">http://www.uncitral.org/en-index.htm</a> )
Civ.	Tribunal de première instance (Chambre civile, Belgium)

- CJ Colectânea de Jurisprudência (Coimbra 1. 1976 ff.; cited by year, volume and page)
- C.J. Lord Chief Justice (England)
- CJ(ST) Colectânea de Jurisprudência. Acórdãos do Supremo Tribunal de Justiça (Coimbra 1. 1993 ff.; cited by year, volume, and page)
- CLJ The Cambridge Law Journal (Cambridge 1. 1921/23 ff., parts without volume numbers; cited, as far as possible, by volume, year, and page)
- CLR Commonwealth Law Reports (Melbourne 1. 1903 ff.; cited by volume, year and page)
- Cmdnd Command Papers, 5th Series (London, 1956-1986, cited by year and page)
- Coll. Arb. Collegio Arbitrale (Italy)
- COM Publications of the European Commission (Brussels 1. 1968 ff.)
- Const LJ Construction Law Journal, (London, 1984-, cited by vol. and page)
- Const LR Construction Law Reports (London, 1984-, cited by vol. and page)
- Corte Cost. Corte Costituzionale (Constitutional Court, Italy)
- Cox Eq Cas Cox's Equity Cases (London, 1745-1797, cited by year, vol. and page)
- CP Code Pénal (Penal Code, France, Luxembourg), 16 June 1879 (Mémorial 1879 p. 589);  
Code Pénal/Strafwetboek (Penal Code, Belgium), 8 June 1867 (Monit.belge 9 June 1867);  
Codice Penal (Penal Code, Italy), n. 1938, 19 Sep. 1930 (Gaz. Uff. no. 253 suppl. 28 Sep. 1930);  
Código Penal (Penal Code Spain), 14 Sep. 1973 (BOE no. 297-300, 12-15 Dec. 1973);  
Código Penal (Penal Code, Portugal), Decreto 16 Sep. 1886
- C.P. Common Pleas Cases (London 1865-1875; cited by year, volume and page; see L.R.)
- CPC Codice di procedura civile (Italy)
- D Dunlop, Bell & Murray's Reports, Session Cases, Second Series (1838-1862)
- D. Recueil de jurisprudence Dalloz (Paris; also Recueil général des lois et arrêts resp. Recueil Sirey; 1801/02 ff.; with different forms and titles: D.A. (Recueil analytique Dalloz [1941-1944]); D.C. (Recueil critique Dalloz [1941-1944]); D.H. (Recueil hebdomadaire Dalloz [1924-1940]); D.P. (Recueil périodique et critique Dalloz [1924-1940]); Recueil Dalloz, Recueil Sirey, combined since 1955; Recueil Dalloz et Recueil Sirey; from 1965: Recueil Dalloz-Sirey; from 2001 also D.Aff. [Cahier droit des affaires] and D. AJ [Actualité jurisprudentielle]; appearing in sections: D. Chron./Jur. [Chronique/Jurisprudence], D. I.R./Légis. [Informations Rapides/Législation], D. Somm.Comm. [Sommaires Commentés]; cited by year, book, and page)
- D. décret (decree, France)
- D. Digesten

DEE	Dikaio Epicheiriseon kai Etairion (Enterprises and Company Law; 1. 1995, Athen)
Dir.inf.	Diritto dell'informazione e dell'informatica (Milan 1. 1985 ff.; cited by year and page)
diss.	dissertation
D.L.R.	Dominion Law Reports (Aurora, Ontario: First Series 1. 1912-70. 1922; 1923-1955; Second Series 1. 1956-70. 1968; Third Series: 1. 1969-150. 1984; Fourth Series 1. 1984 ff.; cited by year, volume and page)
DPR	Decreto Presidente della Repubblica (Presidential decree, Italy)
d. p. r.	Decreto del Presidente della Repubblica (Italy)
DTI	Department of Trade and Industry [United Kingdom]
E & B	Ellis & Blackburn's Queen's Bench Reports (120-121 ER). 1858-1861
EC	European Community
E.C.H.R.	European Convention on Human Rights
ECJ	European Court of Justice (Luxembourg)
ECR	European court reports. Reports of cases before the Court of Justice and the Court of First Instance/Court of Justice of the European Communities (Luxembourg 1. 1954 ff.) (until 1989 Reports of cases before the Court) (cited by volume, year, and page)
edn.	edition
ed(s).	editor(s)
EfAth	Efeteio Athinon, CA Athens
e. g.	exempli gratia (for example)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche (BGB Introductory Act, 18 Aug. 1896; RGBl. p. 604) (Germany)
EKHG	Eisenbahn- und Kraftfahrzeughaftpflicht-Gesetz (Rail and Road Traffic Liability Act of 21 Jan. 1959; BGBl. 1959/48, Austria)
EllDik	Elliniki Dikeosini (Athens 1. 1960 ff.; cited by volume, year, and page)
EMLR	Entertainment and Media Law Reports (London, 1998-, cited by year and page)
ERPL	European Review of Private Law (Deventer 1. 1994 ff.; cited by volume, year, and page)
EU	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (Munich, Frankfurt/Main 1. 1990 ff.; cited by year and page)
EWCA Civ	Approved judgment of the Court of Appeal, Civil Division. England and Wales
EWHC	<i>Approved judgment of the High Court. England and Wales</i>
Ex.	Exchequer Cases (London 1865-1875; cited by volume, year, and page; see L.R.)

F	Fraser's Session Cases, 5 <sup>th</sup> Series (1898-1906)
FamRZ	Zeitschrift für das gesamte Familienrecht (Bielefeld 1. 1954 ff.; until 9. 1962: Ehe und Familie im privaten und öffentlichen Recht [Marriage and Family within Private and Public Law]; cited by year and page)
fasc.	fascicule
Fin LR	Financial Law Reports (Brentford, 1982-, cited by vol., year and page)
fn.	footnote
Foro it.	Il Foro italiano: raccolta di giurisprudenza civile, commerciale, penale, amministrativa (Rome, 1. 1876 ff.; cited by year, book, and column)
FP6	Sixth Framework Programme on Research
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000 (United Kingdom)
Gaz.Pal.	La gazette du palais: feuille officielle d'annonces légales (Paris 1. 1886 ff.; cited by year, book, and page)
GenTG	Gentechnikgesetz. Gesetz zur Regelung der Gentechnik, 20. June 1990 (BGBl. I p. 1080) (Act on the Regulation of Genetic Engineering, Germany)
Giur. it.	Giurisprudenza italiana (Turin 14. 1862-25. 1873; 3rd series 26. 1874-32. 1880, 4th series 33. 1881 – 43. 1891, 5th series 44. 1892-64. 1912, 110. 1958 ff.; cited by year, part, and if necessary, section and column)
Giust. civ.	Giustizia civile. Rivista bimestrale di giurisprudenza (Milan 1. 1951 ff.; cited by year, book and page)
Giust. civ. Mass.	Giustizia civile. Massimario annotato della cassazione (Milan 1. 1955-7. 1957 (1957/58), 1958 ff.; cited by year, number and page)
G.U.	Gazzetta Ufficiale della Repubblica italiana (Official Gazette; Italy) (Rome, 1. 1860 ff.; cited by year, number and page)
H	Decisions of the danish Højesteret (High Court) published in UfR
HaftPflG	Haftpflichtgesetz, 4. January 1978 (BGBl. I S. 145) (liability act, Germany)
HD	Redogørelser och meddelanden angående högsta domstolens avgöranden (Collection of Judgments by the Finnish Supreme Court) (Helsinki 1. 1926 ff.; cited by year, number and page)
HD	Højesteretsdom (Denmark); Høyesterettsdom (Norway); Högsta domstolens domar (Sweden, Finland) (Judgment of the Supreme Court)
HGB	Handelsgesetzbuch, 10 May 1897 (RGBl. p. 219, BGBl III 4100-1) (Commercial Code, Germany and Austria)
HL	House of Lords (United Kingdom)
H.R.	Hoge Raad (Supreme Court, Netherlands)

ICC	International Chamber of Commerce
I.C.C.L.R.	International Company and Commercial Law Review (London, 1990-, cited by year and page)
ICLQ	International and Comparative Law Quarterly. (London, 1952-, cited by year, number and page)
ICR	Industrial Cases Reports (London, 1975-, cited by year and page)
ICSTIS	Independent Committee for the Supervision of Telephone Information Services
i. e.	id est (that is to say)
IEHC	Approved judgment of the High Court. Republic of Ireland
IHR	Internationales Handelsrecht, Zeitschrift für das Recht des internationalen Warenkaufs- und -vertriebs (München, 1999-, cited by year and page)
ILT	Irish Law Times (New Series, Dublin 1. 1983 ff.; cited by year and page)
Incoterms	International Commercial Terms
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (Bielefeld 1. 1981 ff; cited by year and page)
IPRE	IPR-Entscheidungen 1-3, Österreichische Entscheidungen zum internationalen Privatrecht bis 1983, ed. by Schwimann (1984)
IPRG	Bundesgesetz über das internationale Privatrecht, 15. 6. 1978 (BGBl 304) (Act on Private International law, Austria)
IR	Informations rapides du recueil Dalloz, France; see D.
I.R.	The Irish Reports (Dublin 1. 1894 ff; including the sub-series Common Law Series [1. 1867 (1868) – 11. 1877 (1878)] as well as Equity Series [1. 1867 (1868) ff.]; cited by year, book and page)
ISC	Indicatore Sintetico di Costo – i. e. a combined indicator of the price comprehensive of interest rates and of the charges which determine the total cost for the consumer, in accordance with the directive which will be issued by Banca d'Italia
IT-law	The law related to Information technology
J.	Lord Justice (High Court, UK)
JBl	Juristische Blätter (Vienna 1. 1872 ff.; cited by year and page)
JClCiv	Collection des Juris-Classeurs. Juris-Classeur Civil. Directeurs à partir de 1980 Catala and Simler (Paris 1962 ff.)
JCP	Juris-Classeur périodique; see Sem.Jur.
JDI	Journal du droit international privé (Paris, 1874-, cited by year and page)
J. Int'l Fin. Mkt.	Journal of International Financial Markets (Amsterdam, 1994-, cited by year, vol. and page)
JT	Juridisk Tidskrift vid Stockholms Universitet (Stockholm 1. 1989/90 ff., cited by year and page)
J.T.	Journal des Tribunaux (Brussels 1. 1881-96. 1981; 101. 1982 ff.; 97. – 100. not produced; cited by year and page)

- JuS Juristische Schulung (Munich, Frankfurt am Main 1. 1961 ff.; cited by year and page)
- JUS *Rivista di scienze giuridiche* (Milan 1. 1940-4. 1943; NS 1. 1950-20. 1969; 21. 1974 ff.; cited by year and page)
- JZ *Juristenzeitung* (Tübingen 1. 1945 ff.; Continuation of the German *Rechtszeitschrift* and the South German *Juristenzeitung*, vol. 6. 1951 ff.; cited by year and page)
- K.B. The Law Reports. King's Bench Division (London, 1. 1875/76 ff.; cited by year, book and page)
- KB Koninklijk Besluit (Royal decree, Netherlands)
- KritE Kritiki Epitheorisi (Athens 1. 1994, cited by year and page)
- KSchG Konsumentenschutzgesetz, 8. March 1979 (BGBl 1979/140) (Consumer Protection Act, Austria)
- L. Loi (France); Lov (Denmark); Lag (Finland, Sweden) (Act, Statute)
- Law Com. Law Commission Report. England and Wales
- LG Landgericht (Germany); Landesgericht (Court of First Instance, general jurisdiction, also Court of Appeal for Local Courts; Austria)
- LGDJ Librairie Générale de Droit et de Jurisprudence; French publishing company
- LGR Local Government Law Reports (London 1. 1911 ff.; cited by volume, year and page)
- L.J. Lord Justice (Court of Appeal judge, UK)
- Lloyd's Report Lloyd's Law Reports (London 1. 1968 ff.; cited by volume, year and page)
- Lloyd's Rep Med Lloyd's Reports: Medical (London, cited by year and page)
- L.Q. Rev. The Law Quarterly Review (London 1. 1885 ff.; cited by volume, year and page)
- L.R. Law Reports. Publications of the Incorporated Council of Law Reporting (1865-1875 [the year of foundation of the High Court] in 11 files [here cited with the A&E, Ch. App., the C.P., the Ex., the P.C. and the Q.B.]; usually L.R. is put at the head of citations of decisions of the series up to 1875. 1875 the 11 files were reduced to 6 [App.Cas., Ch. D., Q.B.D., C.P.D., Ex. D., P.D.]. Since 1881 the Law Reports are published in 4 files [App.Cas., Ch. D., Q.B.D., P.D.]. Since 1890 cited in a different way: the volume does not appear any more, but the year, put at the head within brackets; in case the reporting took more than one volume, the volume appears behind the year)
- LuftVG Luftverkehrsgesetz, 14 Jan. 1981 (Air Traffic Act) (BGBl. I p. 61, Germany); (RGBl. 1936 I p. 653, Austria)
- M Macpherson's Session Cases, 3rd series (Scotland) (1862-1873; cited by year, book and page)
- Mass. Foro it. Massimario del Foro italiano

Monit. belge	Moniteur belge des arrêtés des secrétaires généraux: journal officiel (Official gazette; Belgium) (Brussels 1. 1831 ff.; cited by date)
MR	Master of the Rolls (Member and President of the Court of Appeal, UK)
MvA	Memorie van Antwoord
M & W	Meeson & Wels by's Exchequer Reports (150-153 ER). 1836-1847
NCPC	Nouveau Code de procédure civile. French code on procedural law
NJ	Nederlandse Jurisprudentie (Zwolle 1913 ff.; until 1935 cited by year and page, then by year, number, and page)
NJA	Nytt Juidiskt Arkiv (Stockholm 1. 1874 ff; as of 1876 separation into two divisions: division 1: Rättsfall från högsta domstolen, until 1 Oct. 1983 called Tidskrift för lagstiftning; cited by year, number and page; division 2: Tidskrift för lagstiftning, cited by year, division and page)
NJB	Nederlands Juristenblad (Zwolle 1. 1926 ff.; 1936-1943; same contents as Weekblad van het recht; cited by year and page)
NJW	Neue Juristische Wochenschrift (Munich et al. 1. 1947 ff.; previously: JW; cited by year and page)
NoB	Nomiko Bima; miniaion nomikon periodikon (Law Tribune, Athens 1. 1953 ff., cited by volume, year and page)
Nss. D.I.	Nuovissimo Digesto italiano
NY	New York Court of Appeals Reports (Albany, NY, 1893-, cited by number, year and page)
NZLR	New Zealand Law Reports (Wellington, 1. 1883 ff.; cited by year, section, and page)
obs.	observations
OGH	Oberster Gerichtshof (Supreme Court, Austria)
OJ	Official Journal of the European Communities (Brussels 1. 1958 ff.; from 11. 1968 ff.: issue C [Communication]: Information and Notices; from 1. 1958 ff.: Issue L [Législation]: Legislation; cited by issue, number, date and page)
ÖJZ	Österreichische Juristenzeitung (Vienna 1. 1946 ff.; cited by year and page)
OLG	Oberlandesgericht (Court of Appeal; Austria, Germany, Greece)
Ont HCJ	Ontario High Court of Justice
OR (2d)	Ontario Reports, Second Series (Toronto, 1882-, cited by year, number and page)
Pas.	Pasicrisie belge (Recueil général de la jurisprudence des cours et tribunaux de Belgique)
Pas. lux.	Pasicrisie luxembourgeoise (Recueil de la jurisprudence luxembourgeoise en matière civile, commerciale, criminale, de droit public, fiscal, administratif et notariel; Luxembourg 1. 1881 ff.; cited by volume, year and page)

P.C.	Privy Council Appeals (London 1865-1875; cited by year, volume and page; see L.R.)
PECL	Principles of European Contract Law
ProdHaftG	Produkthaftungsgesetz. Gesetz über die Haftung für fehlerhafte Produkte, 15 Dec. 1989 (BGBl. I p. 2198) (Product Liability Act, Germany)
Phi	Produkthaftung International (Karlsruhe, 1. 1981 ff.; cited by year and page)
PNLR	Professional Negligence and Liability Reports (London, 1999-, cited by year and page)
POS Regulations	The Public Offers of Securities Regulations
Pret.	Pretura (Local Court, Italy)
Q.B.	The Law Reports. Queen's Bench Division (London 1. 1890 ff.; cited by year, book, and page, additional L.R. cited: London 1865-1875)
QBD	Law Reports, Queen's Bench Division (London, 1875-1890, cited by year, book, and page)
RabelsZ	Zeitschrift für ausländisches und internationales Privatrecht (Berlin, Tübingen, 1. 1927 ff.; from vol. 26. 1961: Rabels Zeitschrift für ausländisches und internationales Privatrecht; cited by volume, year and page)
RAJ	Repertorio Aranzadi de Jurisprudencia (Pamplona 1. 1930/31, 2. 1934 ff.; cited by year, number and page)
Rass. dir. civ.	Rassegna di diritto civile (Naples 1. 1980 ff.; cited by year and page)
RCJB	Revue critique de jurisprudence belge (Bruxelles, 1. 1947 ff; cited by year and page)
RdW	Österreichisches Recht der Wirtschaft (Vienna 1. 1983 ff.; cited by year and page)
Rep. Giur. it.	Repertorio generale della giurisprudenza italiana (Turin 1. 1848 ff.; cited by year, key word and number)
Resp. civ. et assur.	Responsabilité civile et assurances. Revue mensuelle (Paris 1. 1988 ff.; cited by year and page)
Rev. crit. dr. int. pr.	Revue critique de droit international privé (Paris, 1905-, cited by year and page)
Rev. Hell. de Droit Int.	Revue Hellénique de droit international (Athens 1. 1948 ff.; cited by volume, year and page)
Rev. trim. dr. civ.	Revue trimestrielle de droit civil (Paris 1. 1902-38. 1939, 39/40. 1940/41-78. 1979 = tome 39-77, 79. 1980 ff.; until 1977 by vol., then by year and page)
RG	Reichsgericht (Supreme Court of the German Reich, Germany)
RG	Relazione del Guardasigilli al progetto ministeriale delle obbligazioni (see Pandolfelli et al., Codice civile, in the Table of Literature Cited in an Abbreviated Form)
RGAR	Révue générale des assurances et des responsabilités (Brussels 1. 1927 ff.; cited by year and number)

RGZ	Amtliche Sammlung der Entscheidungen des Reichsgerichtes in Zivilsachen (Decisions of the German Imperial Court in civil matters) (Berlin 1. 1872-172. 1945; cited by volume and page)
RIS-Justiz	Austrian internetpublication of OGH-decisions, <a href="http://www.ris.bka.gv.at/jus/">www.ris.bka.gv.at/jus/</a> ; decisions are cited by date, number of legal subject and keyword
Riv. crit. dir. priv.	Rivista critica del diritto privato (Bologna 1. 1989 ff.; cited by year and page)
Riv. dir. civ.	Rivista di Diritto Civile (Padua 1. 1955 ff.; cited by year, book and page)
Riv. dir. comm.	Rivista del Diritto Commerciale e del Diritto generale delle obbligazioni (Milan 1. 1903 ff.; cited by year, book and page)
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale (Padova, 1969-, cited by year and page)
Riv. it. med. leg.	Rivista italiana di medicina legale (Milano, 1979-, cited by year and page)
RIW	Recht der Internationalen Wirtschaft (Heidelberg 1954-1957 and 1975 ff.; from 1958 to 1974 Außenwirtschaftsdienst des Betriebsberaters [AWD]; cited by year and page)
RLJ	Revista de Legislação e Jurisprudência (Coimbra 1. 1868/69 ff.; cited by volume, year and page)
Rt.	Retstidende (Norway), publishing the decisions of the norwegian Høyesterett
RvdW	Rechtspraak van de Week (Zwolle 1. 1939 ff.; cited by year and number)
RW	Rechtskundig Weekblad (Antwerp 1. 1931/32 ff.; cited by year and page)
S	Shaw's Session Cases, First Series (1821-1838, cited by year and page)
S.	Sirey; see D.
S.A.L.R.	South Australian Law Reports (Melbourne, 1869-, cited by number and page)
SAP	Decision of a Court of Appeal (Spain)
S.C.	Session Cases. New Series. Cases decided in the Court of Session, and also in the Court of Justiciary (J.C.) and the House of Lords (H.L.); (Edinburgh 1. 1907 ff.; cited by year and page)
SCLR	Scottish Civil Law Reports. (Edinburgh, 1987-, cited by year and page)
Scot.Law Com.	Scottish Law Commission Report (Edinburg, 1966-, cited by number, year and paras.)
Scot CS	Approved judgment of the Court of Session. Scotland
Sem.Jur., Ed. E.	La Semaine Juridique, Edition Entreprise. Cahiers de Droit de l'entreprise (Paris 1. 1966 ff; cited by year, part and number)
Sem.Jur., Ed. G.	La Semaine Juridique, Edition Générale. (also Juris Classeur Périodique; Paris 1. 1927 ff.; cited by year, book and number)

SFS	Svensk författningssamling (Official gazette, Sweden) (Stockholm 1. 1825 ff.; cited by year and number)
SGECC	Study Group on an European Civil Code
S.I.	Statutory Instrument
SLPQ	Scottish Law and Practice Quarterly (London, 1995-, cited by year, number and page)
SLR	Scottish Law Reporter. 1865-1925
SLT	Scots Law Times (News and reports, the latter with separate pagination) (Edinburgh, 1. 1893/94 ff.; Sheriff Court Reports, 1. 1922 ff.; cited by year and page)
STJ	Supremo Tribunal da Justiça (Supreme Court, Portugal)
StVG	Straßenverkehrsgesetz, 19 Dec. 1952 (BGBl. I p. 832) (Road Traffic Act, Germany)
Sup. Ct.	Supreme Court (Ireland)
SvJT	Svensk Juristtidning (Stockholm 1. 1916 ff.; cited by year and page)
SZ	Entscheidungen des österreichischen Obersten Gerichtshofs in Zivilsachen (Vienna 1. 1919-20. 1938; 21. 1946 ff.; with changing titles; until vol. 34. 1961: Entscheidungen des österreichischen obersten Gerichtshofs in Zivil- und Justizverwaltungssachen; cited by volume, number, and page)
TC	Tribunal Constitucional (Constitutional Court; Spain)
TfR	Tidsskrift for Rettsvitenskap (Oslo 1. 1888 ff.; cited by year and page)
ToS	To Syntagma (Athens 1. 1975 ff.; cited by volume, year and page)
TPR	Tijdschrift voor Privaatrecht (Ghent 1. 1964 ff.; cited by year and page)
Trib.	Tribunale (Court of First Instance, general jurisdiction; Court of Appeal in small claims matters; Italy), Tribunal (Court of First Instance; Belgium, France)
T.S.	Tribunal Supremo (if not specified: senate for civil matters) (Supreme Court, Spain)
T.S.J.	Tribunal Superior de Justicia (Supreme Court of the autonomous regions, Spain)
TullRev	Tulane Law Review (New Orleans, 1. 1916 ff.; cited by volume, year and page)
UfR	Ugeskrift for Retsvæsen (Copenhagen 1. 1867 ff.; as of 1902 division into: A = Danks domssamling; B = Juridiske afhandlinger, meddelelser; C = Abstracts; cited by year, book and page)
UIC	Ufficio Italiano dei Cambi
UKHL	Approved judgment of the House of Lords (United Kingdom)
UmweltHG	Umwelthaftungsgesetz, 10 Dec. 1990 (BGBl. I p. 2634) (Environmental Liability Act, Germany)
UNCITRAL	United Nations Commission for International Trade Law

VersR	Versicherungsrecht (Juristische Rundschau für die Individualversicherung; Karlsruhe 1. 1950 ff.; cited by year and page)
VersRAI	Versicherungsrecht Beilage Ausland (Karlsruhe 1. 1959/60, 2. 1961 ff.; cited by year and page)
vol(s).	volume(s)
V.T.SV.	Voorafgaande Titel Wetboek van Strafvordering. Preliminary Title to the Penal Code (Belgium)
WHG	Wasserhaushaltsgesetz. Gesetz zur Ordnung des Wasserhaushalts, 23 Sep. 1986 (BGBl. III pp. 753) (Water Budget Act, Germany)
W.L.R.	The Weekly Law Reports (containing decisions in the House of Lords, the Privy Council, the Supreme Court of Judicature, Assize Courts; London 1. 1953 ff.; cited by year, book and page)
WM	Wertpapier-Mitteilungen: Zeitschrift für Wirtschafts- und Bankrecht (Frankfurt am Main et al. 1. 1947 ff.; cited by year and page)
WRP	Wettbewerb in Recht und Praxis (Frankfurt am Main 1. 1955 ff.; cited by year and page)
ZEuP	Zeitschrift für Europäisches Privatrecht (Munich 1. 1993 ff.; cited by year and page)
ZfRV	Zeitschrift für Rechtsvergleichung (Vienna 1. 1960 ff; cited by year and page)
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (previously Insolvenzrecht; Cologne 1. 1980 ff.; cited by year and page)
ZVR	Zeitschrift für Verkehrsrecht (Vienna 1. 1956 ff; cited by year, number of the decision and page)



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§ 1331:	144.
§ 1331 f.:	87.
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Atomhaftpflichtgesetz (AtomHG, 29 April 1964, BGBl no. 117/1964, Federal Act on Liability for Damages Arising from the Use of Nuclear Energy):

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Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (EKHG, 21 Jan. 1959, BGBl 1959/48, Rail and Road Traffic Liability Act):

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Gentechnikgesetz (GentechnikG, BGBl no. 510/1994, BGBl I no. 73/1998, Act on Genetic Engineering):

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Grundbuchsgesetz (GBG, 2 Feb. 1955, BGBl. 39/155, Land Registration Act):  
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Handelsgesetzbuch (HGB, 10 May 1897, RGBl. 1897, p. 219, Commercial Code):  
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IPR-Gesetz (Bundesgesetz über das Internationale Privatrecht, 15 Jun. 1978, BGBl. 1978/304, Act on International Private Law):  
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Konsumentenschutzgesetz (KSchG, 8 Mar. 1979, BGBl. 1979/140, Consumer Protection Act):  
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Luftfahrtgesetz (LFG, 2 Dec. 1957, BGBl 1997 I no. 102/1997, Air Traffic Act):  
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Mediengesetz (MedG, BGBl. 1981/314, Media Act):  
 § 6 para 1: 157.

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 § 8 para 3: 144.

Polizeibefugnis-Entschädigungsgesetz (PolBEG, BGBl. 1988/735, Act on Damages caused by the Police)  
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Wasserrechtsgesetz (WRG, BGBl. 1959/215, 1999/115, Water Act):  
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## Belgium

CC (Code civil/Burgerlijk Wetboek, 21 Mar. 1804, Civil Code):

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Voorafgaande Titel Wetboek van Strafvordering (V.T.SV., in the setting of the law of 10 June 1998, First Title of the Law Book of Criminal Procedural Law):

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## Denmark

Erstatningsansvarsloven (EAL, no. 228, 23 May 1984, Lovtindende A 1984, 742, as amended by Act no. 389 of 7 June 1989, Lovtindende A 1989, 1304, Act on Liability for Damages):

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Konsumentskyddslag (Consumer Protection Act) (20 January 1978/38):  
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Lag om paketresor (Package Tour Act) (28 Nov. 1994, no. 1079):  
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MK (Maakaari, 12 April 1995/540, Real Estate Act)  
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SKL (Skadestandslag, no. 412, 31 May 1974; FFS 1974/412; as amended by Act of 23 Mar. 1979, FFS 1979/373, 790, Liability Act):  
 chap. 5 § 1 line 2: 45.  
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CC (Code civile, 21 Mar. 1804, Civile Code):  
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Product Liability Act (Loi n° 98-389, 19 May 1998, incorporated in the CC):

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Arzneimittelgesetz (AMG, 24 Aug. 1976, BGBl I, p. 2995, Act on Medication Reform):

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Atomgesetz (AtomG, 31 Oct. 1965, BGBl. 1976 I, p. 3053, Act on Nuclear Power):

§§ 25 ff.:	74.
§ 29 para 2:	123.

Bürgerliches Gesetzbuch (BGB, 18 Aug. 1896, RGL. 1896, p. 195 as amended by the Schuldrechtsmodernisierungsgesetz, 23 July 2001, BGBl. III 400-2, Civil Code):

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Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB, 18 Aug 1896, RGBl, 1896, p. 604, as amended 21 Sept. 1994, BGBl. I, p. 2494, Introductory Dispositions to the BGB):

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Gentechnikgesetz (GenTG, 20 June 1990, BGBl. I, p. 1080, Act on Genetic Engineering):

§ 32:	74.
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Grundgesetz (GG, 23 May 1949, BGBl. 1949, p. 1, Basic Law for the Federal Republic of Germany):

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Haftpflichtgesetz (HPfLG, 4 Jan. 1978, BGBl. I, p. 145, BGBl. III 935-1, Liability Act):

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Handelsgesetzbuch (HGB, 10 May 1897, RGBl. p. 219, BGBl. III 4100-1, Commercial Code):

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Luftverkehrsgesetz (LuftVG, 14 Jan. 1981, BGBl. I, p. 61, Air Traffic Act):

§ 33:	74.
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Produkthaftungsgesetz (ProdHG, 15 Dec. 1989, BGBl. I, p. 2198, Product Liability Act):

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Umwelthaftungsgesetz (UmweltHG, 10 Dec. 1990, BGBl. I, p. 2634, BGBl. III 2129-23, Environmental Liability Act):

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CC (Astikos Kodikas [AK], 23 Feb. 1946, A.N. 2250/1940, FEK A 91/1940 p. 597, Civil Code):

Art. 26:	459.
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Attuazione della direttiva 92/50/CEE in materia di appalti pubblici di servizi (Legislative Decree 17 Mar. 1995, no. 157):

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CC (Codice civile, RD 16 Mar. 1942, no. 262, Gazz. Uff. of 4 Apr. 1942, nos. 79 and 79bis, edizione straordinaria, Civil Code):

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CP (Codice Penale, RD 19 Oct. 1930 no. 1938, Gazz. Uff. 28 Oct. 1930, no. 253 suppl., Penale Code):

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Art. 96 para 1:	155.
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Conversione in legge con modificazioni del decreto legislativo 8 aprile 1974 n. 95 recante disposizioni relative al mercato mobiliare e al trattamento fiscale dei titoli azionari (Law 7 June 1974, no. 216):

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Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità Europee (Law 19 February 1992, no. 142):

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Istituzione e disciplina dei fondi comuni di investimento mobiliare (Law 23 Mar. 1983 no. 77):

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Nuove disposizioni in materia di organizzazione e di rapporti di lavoro nelle amministrazioni pubbliche, di giurisdizione nelle controversie di lavoro e di giurisdizione amministrativa, emanate in attuazione dell'art. 11, co. 4, della L. 15 marzo 1997, n. 59 (Law 31 March 1998, no. 80):

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Legge quadro in materia di lavori pubblici (Law 11 February 1994, no. 109):

Art. 32 para. 3: 414.

Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e dell'attività sindacale nei luoghi di lavoro norme sul collocamento-Statuto dei lavoratori-, (Law 20 May 1970, no. 300):

Arts. 15 f.: 135.

Parità di trattamento tra uomini e donne in material di lavoro (Law 9 December 1977, no. 903):

Art. 15: 135.

Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali (Law 31 Dec. 1996, n. 675):

Art. 29 para. 9: 52.

## Luxembourg

CC (Code civil, 5 Mar. 1803, Civil Code):

Art. 1150: 108.

Art. 1315: 75.

Art. 1374 para 2: 220.

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BW, Civil Code (Burgerlijk Wetboek, 1 Jan. 1992, Book 3-7A, 1 Jan. 1992: Stb. 1989 no. 61 in conjunction with KB, 20 Feb. 1990: Stb. No. 90):

Art. 3:1: 470; 471.

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Package Travel Law 198/93, 27 May 1993:  
133.

Decreto-Lei no. 220/95, 31 Aug. 1995;  
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Decreto-Lei no. 209/97, 13 Aug. 1997:  
133.

Decreto Lei no. 12/99, 11 Jan. 1999 (Agências de viagem e turismo):  
Art. 41 para 2, lit. c: 133.

Decreto-Lei no. 249/99, 7 July 1999:  
230.

Land Registration Act:  
art. 6 532.

## Spain

Act on Package Tours. Ley reguladora de los Viajes Combinados no. 21/1995, 6 July 1995, BOE no. 161, 7 July 1995. (Art. 13 as amended by Ley no. 39/2002, 28 Oct. 2002, BOE no. 259, 29 Oct. 2002):  
Arts. 11-13: 133.

Building Regulations Act, Ley de Ordenación de la Edificación no. 38/99, 5 Nov. 1999, BOE no. 266, 6 Nov. 1999:  
Arts. 17 f.: 310.

CC (Codigo civil, 24 July 1889, Gaceta de Madrid no. 206, 25 July 1889, Civil Code):  
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Código Penal (CP [NCP], Ley Orgánica 10/1995, 23 Nov. 1995, BOE no. 281, 24 Nov. 1995, [New] Penal Code):

Arts. 109 ff.:	73.
Art. 110 para 3:	121.
Art. 114:	246.
Art. 120 para 4:	207.

Law on civil protection of the rights to honour, to private life and to one's own image (Ley Orgánica 1/1982, de 5 de Mayo, de Protección Civil del Derecho al Honor, a la Intimidación Personal y Familiar y a la Propia Imagen, BOE no. 115, 15 May 1982):

General: 50.

Art. 9 para 3: 156.

Consumer Protection Act (no. 26/1984, 19 July 1984, Ley General para la defensa de los consumidores y usuarios, BOE no. 176, 24 July 1984):

General: 236.

Art. 25: 361.

Decreto número 43/95 (6 April 1995, Reglamento de Agencias de Viajes de la Comunidad Autónoma de las Islas Baleares, Boletín Oficial de la Comunidad Autónoma de las Islas Baleares número 61, 13 May 1995, Order of the Autonomous Region of the Balearic Islands on Travel Agencies, the Order has been repealed by the Decreto no. 60/97, 7 May 1997, BOCAIB no. 63, 24 May 1997):

General: 133.

Decreto número 168/94 (30 May 1994, de reglamentación de las agencias de viajes de la Comunidad de Catalunya, Diario Oficial de la Generalitat de Catalunya número 1924, 22 July 1994, Decree regulating the travel agencies of the Autonomous Region of Catalonia):

General: 133.

Ley 28/1998, 13 July (de Venta a Plazos de Bienes Muebles, BOE no. 167, 14 July 1998, Act on the Sale of moveable goods in rate-payment. Art. 15.3 in the version of Ley no. 1/2000, 7 Jan., BOE no. 7, 8 Jan. 2000):

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Ley sobre condiciones generales de la contratación no 7/1998, 13 April 1998 (Act on general terms of business):

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Ley Hipotecaria, Decret of 8 Feb. 1946, BOE no. 58, 27 Feb. 1946, Mortgage Act:

Art. 142: 540.

Art. 149: 541.

Order of 14 April 1988 of the Spanish Ministry of Transport, Tourism and Communications, approving the regulatory on Travel Agencies (por la que se aprueban las normas reguladoras de las Agencias de Viajes, BOE número 97, 22 April 1988):

General: 133.

Real Decreto número 271/88, 25 Mar. 1988 (por el que se regula el ejercicio de las actividades propias de las Agencias de Viajes, BOE número 76, 29 Mar. 1988, Royal Decree regulating the exercise of activities characteristic of Travel Agencies):

General: 133.

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Act on Debtor's Bonds [lag (1936:81) om skuldebrev]:

§ 7 (2) 3:	92.
§§ 10 and 31:	517.

Act on Measures Against Ethnic Discrimination in Working Life [lag (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet]:

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Act on Names and Images in Advertising [lag (1978:800) om namn och bild i reklam]:

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Act on Prohibition of Discrimination of Disabled Persons in Working Life [lag (1999:132) om förbud mot diskriminering i arbetslivet av personer med funktionshinder]:

§§ 12-15:	136.
§ 16:	255.

Act on Prohibition of Discrimination of part-time Employees and Employees with Positions of limited Duration [lag (2002:293) om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning]:

§ 7 (1):	136.
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Act on Prohibition of Discrimination of Persons in Working Life due to their Sexual Orientation [lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning]:

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Act on Protection of Industrial Secrets [lag (1990:409) om skydd för företagshemligheter]:

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Act on Protection of Positions of Employment [lag (1982:80) om anställningsskydd]:

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Act on Trade Agencies [lag (1991:351) om handelsagentur]:

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Commercial Companies and Partnerships Act [*lag (1980:1102) om handelsbolag och enkla bolag*]:

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Competition Law [*konkurrenslag (1993:20)*]:

§ 33:	192.
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Consumer Sales Act [*konsumentköplag (1990:932)*]:

§ 14:	92.
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§ 30 no. 2:	217.
§ 31:	303; 361.
§ 34:	233.
§ 41 no. 3:	92.

Consumer Services Act [*konsumenttjänstlag (1985:716)*]:

§ 17 (1) no. 3:	278.
§ 31:	92.
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Credit Information Law [*kreditupplysningslag (1973:1173)*]:

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Equality Law [*jämställdhetslag (1991:433)*]

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## Limitation Act [Preskriptionslag (1981:130)]:

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## Marketing Law (Marknadsföringslag [1995:450]):

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## National road transport Act [lag (1974:610) om inrikes vägtransport]:

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## Package Tour Act [lag (1992:1672) om paketresor]:

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## Personal Data Law (concerning data protection) [personuppgiftslag (1998:204)]:

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## Penal Code [brottsbalk (1962:700)]:

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## Real Property Act [jordabalk (1970:994)]:

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## United Kingdom

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## Bankruptcy Act 1988:

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## Bills of Sale Act 1878

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## Bills of Sale Act (1878) Amendment Act 1882:

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## Companies Act 1963

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## Companies Act 1985:

General:	577.
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## Consumer Credit Act 1974:

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Consumer Credit (Agreements) Regulations (S.I. 1983/1553):  
regulation 2: 435.

Consumer Protection Act 1987:  
sec. 2: 428.

Contributory Negligence Act 1945:  
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Conveyancing and Feudal Reform Act 1970:  
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Court of Session Act 1988:  
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Damages Act 1976:  
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Data Protection Act 1998:  
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Estate Agents Act 1979:  
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Financial Services and Markets Act 2000:  
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Insolvency Act 1986:  
sec. 315: 574.  
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Land Registration Act 2002 (LRA) on 13 Oct. 2003:  
General: 533.

Land Registration Act 1979 (Scotland):  
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